

1 Roger Flynn (CO Bar # 21078) (*Pro Hac Vice Application Pending*)
 2 Jeffrey C. Parsons (CO Bar #30210) (*Pro Hac Vice Application Pending*)
 WESTERN MINING ACTION PROJECT
 3 P.O. Box 349; 440 Main Street, #2
 4 Lyons, CO 80540
 (303) 823-5738
 5 wmap@igc.org

6 Susan B. Montgomery (AZ Bar # 020595)
 7 Robyn L. Interpreter (AZ Bar # 020864)
 MONTGOMERY & INTERPRETER, PLC
 8 3301 E. Thunderbird Rd.
 9 Phoenix, AZ 85032
 (480) 513-6825
 10 smontgomery@milawaz.com
 11 rinterpreter@milaz.com

12 *Additional Plaintiffs' Counsel Listed in Signature Block Below*

13 IN THE UNITED STATES DISTRICT COURT
 14 FOR THE DISTRICT OF ARIZONA
 15 PHOENIX DIVISION

| | | | |
|----|---|---|------------------------|
| 16 | ARIZONA MINING REFORM COALITION; |) | Case No. |
| 17 | INTER TRIBAL ASSOCIATION OF |) | |
| 18 | ARIZONA, INC.; EARTHWORKS; |) | |
| 19 | CENTER FOR BIOLOGICAL DIVERSITY; |) | COMPLAINT FOR VACATUR, |
| 20 | ACCESS FUND; and GRAND CANYON |) | DECLARATORY AND |
| 21 | CHAPTER OF THE SIERRA CLUB, |) | INJUNCTIVE RELIEF |
| 22 | |) | |
| 23 | Plaintiffs |) | |
| 24 | |) | |
| 25 | vs. |) | |
| 26 | |) | |
| 27 | UNITED STATES FOREST SERVICE, an |) | |
| 28 | agency in the U.S. Department of Agriculture; |) | |
| | NEIL BOSWORTH, Supervisor of the Tonto |) | |
| | National Forest; and TOM TORRES, Acting |) | |
| | Supervisor, Tonto National Forest |) | |
| | |) | |
| | Defendants. |) | |
| | |) | |
| | _____ |) | |

INTRODUCTION

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1. On January 15, 2021, with only five days left in the Trump Administration, the Defendant United States Forest Service (“Forest Service” or “Agency”), Tonto National Forest, issued its Final Environmental Impact Statement (“FEIS”) governing its review of the “Resolution Copper Project and Land Exchange” and related Forest Service proposed approvals of pipelines, roads, electrical transmission lines, infrastructure and other uses of federal public land associated with the proposed Resolution Copper Mine. The Exchange would give to multinational mining conglomerate, London-based Rio Tinto Corp. and related companies (“Rio Tinto,” “Resolution,” or “Resolution Copper”) over 2,400 acres of federal land within the Tonto National Forest.

2. The Exchange and related Forest Service approvals would facilitate Rio Tinto’s proposed mine known as the Resolution Copper Mine (“Resolution Copper Mine,” “Project” or “Mine”). The Mine would pump and dewater groundwater and completely obliterate sacred land, Oak Flat, by creating a roughly two-mile-wide and 1,000 foot deep crater from the “block cave” mine operation. This mining method would involve excavating ore 4,500 to 7,000 feet underground within the exchanged parcel and then collapsing the void areas created by the excavation. The result would be a massive, permanent crater. The Mine would transform Oak Flat, which has since time immemorial, been a place of profound religious, cultural, and historical significance, sacred to indigenous people, including the Western Apache and the Yavapai Peoples, into a rubbleized crater, whose steep and unstable slopes would forever remain unsafe for human use.

3. The faulty FEIS and Project review, hurried through to completion in the waning days of the Trump Administration, is deficient in numerous critical areas, and violates multiple federal laws. As just one example of its rush-to-complete, the agency completely changed its regulatory structure for reviewing the Project in late 2020 but never provided any public review of the regulatory switch, despite the critical public land issues the 11th-hour reversal raises.

1 4. Additional problems with the FEIS include its: legally erroneous “purpose
2 and need” that governed the Forest Service’s review of the Project; failure to provide for
3 and analyze a full range of reasonable alternatives; failure to provide a full analysis of the
4 impacts of those alternatives; failure to apply the full scope of federal laws applicable to the
5 Project; improper regulation and review of the Project and infrastructure under erroneous
6 interpretations of federal law; failure to include any information or opportunity to comment
7 on the appraisals that Congress required to be completed (including the additional Non-
8 Federal lands that may be conveyed to the United States based on the appraisals); failure to
9 adequately analyze connected actions and the direct, indirect, and cumulative impacts from
10 the Exchange and Project; and failure to take the required “hard look” under the National
11 Environmental Policy Act (“NEPA”), as well as otherwise violating federal law as noted
12 herein.

13 5.



1 Oak Flat, shown above, is located within the Tonto National Forest east of the town of
2 Superior, Arizona.

3 6. The Oak Flat area is a place of profound religious, cultural, and historic
4 significance to the San Carlos Apache Tribe and other Indian tribes, nations, and
5 communities in Arizona, including the White Mountain Apache Tribe, the Tonto Apache
6 Tribe, the Fort McDowell Yavapai Nation and others. *See* Hearing before the
7 Subcommittee on Public Lands and Forests of the Committee on Energy and Natural
8 Resources, United States Senate on S.409, 111th Cong., S. Hrg. 111-65 (June 17, 2009); *see*
9 *also* Record of Hearing Before Subcommittee on National Parks, Forests and Public Lands
10 in the U.S. House Natural Resources Committee regarding H.R. 3301, 110th Cong., Serial
11 No. 110-52 (November 1, 2007).

12 7. Oak Flat lies within the ancestral lands of the San Carlos Apache Tribe, just
13 west of the San Carlos Apache Reservation. The San Carlos Apache Reservation is home
14 to more than 17,000 enrolled Tribal members.

15 8. Apache People call Oak Flat “*Chich’il Bildagoteel*,” or “a Flat with Acorn
16 Trees” and it lies at the heart of *T’iis Tseban* Country, which is associated with at least
17 eight Apache clans, and two Western Apache bands, the Pinal Band and the Aravaipa
18 Band.

19 9. Because of its importance to the Apache Tribe and other tribes, nations and
20 communities, Oak Flat is included in the National Register of Historic Places as a
21 Traditional Cultural Property (“TCP”) under Section 106 of the National Historic
22 Preservation Act, 16 U.S.C. § 470 *et seq.* (“NHPA”), and it meets the criteria to be
23 identified as a “sacred site” within the meaning of Executive Order 13007, Indian Sacred
24 Sites, May 24, 1996, 61 Fed. Reg. 26771 (“E.O. 13007”), the American Indian Religious
25 Freedom Act, 42 U.S.C. § 1996, *et. seq.* (“AIRFA”), and related laws, regulations and
26 policies.

27 10. The religious and cultural importance of the Oak Flat area does not reside
28 in isolated spots, but rather in the area as a whole. For the Apache People, the area of “Oak

1 Flat” is bounded to the west by (and including) the large escarpment known as “*Dibecho*
2 *Nadil*” or “Apache Leap” and on to the east by (and including) *Gan Bikoh*, which means
3 “Crowndancers Canyon,” though it is often referred to by Apache People as “Ga’an
4 Canyon” and by non-Indians and in the FEIS as “Devil’s Canyon.” Oak Flat is bounded to
5 the north by (and including) *Gan Daszin* or “Crowndancer Standing,” which is delineated
6 on most maps as “Queen Creek Canyon.”

7 11.



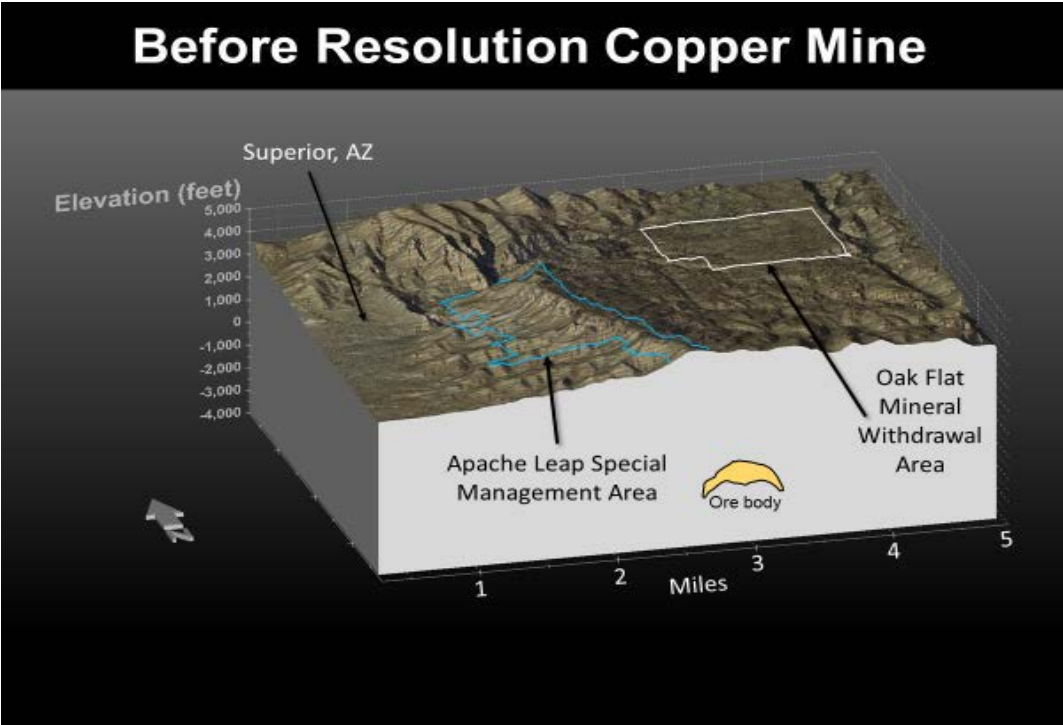
19 *Ga’an Canyon, as referred to by Apache People, which bounds Oak Flat to the east and*
20 *would suffer long term loss of water, seeps and springs as a result of Resolution’s*
21 *groundwater pumping. A large mine waste pipeline would span the Canyon.*

22 12. The ancient oak grove at Oak Flat provides an abundant source of acorns
23 that, for many centuries and even today, provides an important traditional food source for
24 the Apache People. There are also hundreds of plants and other living things in the Oak
25 Flat area that are essential elements of the Apache religion and culture. Some of these
26 plants are medicines known to and harvested only by gifted Apache herbalists. Although
27 these plants can be gathered in other areas, Apaches believe that only plants within the Oak
28 Flat area are imbued with the unique power of this area.

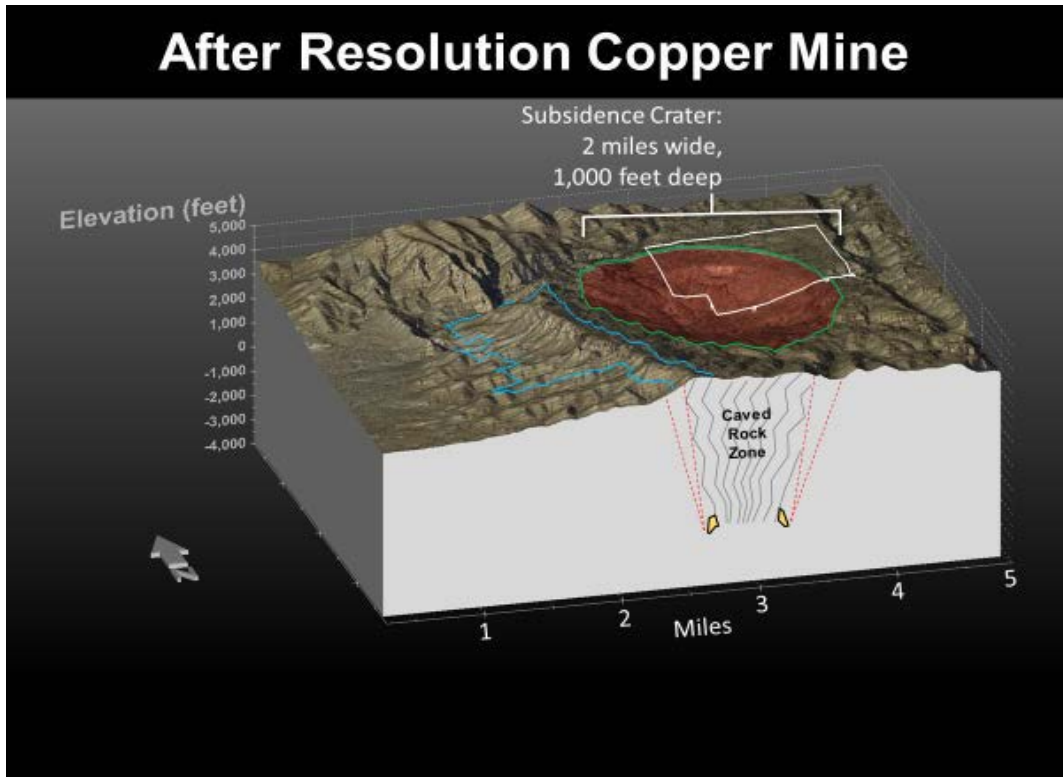
1 13. Oak Flat is also recognized for its beauty and importance to outdoor
 2 enthusiasts, including members of Plaintiff groups who value it for outdoor recreation and
 3 as a place of unique biological diversity. Oak Flat attracts rock-climbers from around the
 4 country as it contains numerous large boulders and outcrops. In the campground and picnic
 5 area, ancient oak trees provide shade for hikers, campers, and picnicking families, and give
 6 sanctuary to many important bird species. Sitting at an approximate elevation of 4,200 to
 7 4,600 feet above sea level, Oak Flat is a cool respite for the many travelers and visitors
 8 from Phoenix and elsewhere, who often recreate at Oak Flat and in the surrounding Forest
 9 Service lands.

10 14. Wildlife cameras have documented a wide variety of wildlife at Oak Flat,
 11 including mountain lion, bear, and coatimundi. Nearby lands provide important wildlife
 12 habitat for Federally listed endangered and threatened species such as the southwestern
 13 willow flycatcher, yellow billed-cuckoo, Gila chub, Arizona hedgehog cactus, and ocelot.
 14 Over 170 bird species have been documented at Oak Flat.

15 15. The “block-cave” mine method and the resulting crater will forever
 16 transform and obliterate Oak Flat:



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Before and After Graphics of Resolution Copper Mine.¹

16. In addition to destroying the sacred lands of Oak Flat, thousands of additional acres would become permanent unlined waste dumps, buried under nearly 1.4 billion tons of toxic waste covering six square miles behind a 490-foot-high dam. This toxic sludge would travel through 19 miles of pipeline, traversing desert canyons, including Ga’an Canyon, and washes to reach this permanent dump location that is upstream and upgradient of the Gila River southeast of the mining area. The Project would also include a new 22-mile pipeline to transport the copper ore concentrate west/southwest towards the town of Magma for further processing and shipment. *See generally*, FEIS at 10-11 (Project description).

¹ Graphics From Written Testimony of James Wells, PhD, Environmental Geologist, L. Everett & Associates, Environmental Consultants, Testimony before House Natural Resources Subcommittee on Indigenous Peoples of the United States Hearing on “The Irreparable Environmental and Cultural Impacts of the Proposed Resolution Copper Mining Operation” 12 (Mar. 12, 2020) *available at* <https://naturalresources.house.gov/download/0312-witness-testimony-dr-wells>.

1 17. The Project would use massive amounts of water. The estimated total
2 quantity of water needed for the life of the mine (construction through closure) ranges from
3 up to 677,000 acre-feet (“AF”) as analyzed in the FEIS to as much as 786,626 AF predicted
4 in Resolution’s mine plan.² The water would be consumed from various sources, including
5 from mine dewatering and groundwater pumping. Much of the water consumed by the
6 Project would be pumped from the groundwater underlying the heart of the East Salt River
7 Valley.

8 18. The Exchange and Project would perpetrate a systematic violation of
9 *Chich’il Bildagoteel* (Oak Flat) through mining, drilling, groundwater pumping (resulting
10 in severe impacts to water resources), grading, construction, road building and expansion,
11 traffic, light and noise pollution, sediment and erosion, and other activities. These activities
12 would result in the physical destruction of Oak Flat, forever changing the character of Oak
13 Flat relative to its crucial role in Apache religion and culture, and the introduction of
14 auditory, visual and atmospheric disturbances that would profoundly diminish the integrity
15 of this special place (both as a “Traditional Cultural Property” under the National Historic
16 Preservation Act and sacred site) for Tribal members.

17 19. The Mine and Exchange have long been opposed by the San Carlos Apache
18 Tribe, whose reservation is located just east of the Exchange area, along with essentially all
19 other Native American Tribes in Arizona, including all of the Member Tribes of Plaintiff,
20 the Inter Tribal Association of Arizona, Inc. (“ITAA”), which, through ITAA or its sister
21 organization, the Inter Tribal Council of Arizona, Inc., has testified in Congress against the
22 Exchange and enacted resolutions in opposition to the Exchange and Mine.

23 20. The significance of Oak Flat has been long recognized. In 1955, 760-acres
24 of Forest Service managed lands that are included in the Exchange and would be
25 permanently damaged by the Mine, were withdrawn from mining and mineral entry by the
26 Eisenhower Administration as the “Oak Flat Withdrawal Area” in Public Land Order 1229.
27 The withdrawal prevented mining companies, such as Rio Tinto, from conducting mineral
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² An acre-foot of water equals roughly 325,851 gallons.

1 exploration or other mining-related activities at or underneath the Withdrawal Area. That
2 withdrawal is still in place today and until the Exchange occurs, no mining on or under
3 these lands can be authorized.

4 21. After a decade of lobbying to acquire these sacred lands around the copper
5 deposit that Rio Tinto seeks to mine, a rider was added to a must-pass appropriations bill
6 for the Defense Department leading to Congressional authorization of the Exchange. But
7 Congress expressly conditioned the Exchange on the Forest Service issuing the FEIS in full
8 compliance with the terms of the Act and all applicable laws. *See* Section 3003 of the Carl
9 Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year
10 2015 for fiscal year 2015. Pub. L. 113-291 (“NDAA” or “Section 3003”). And it is only
11 after such a lawful document is issued that the Exchange clock could start, providing 60
12 days for the Secretary of Agriculture to execute the Exchange. §3003(c)(10) (“Not later
13 than 60 days after the publication of the final environmental impact statement, the Secretary
14 [of Agriculture] shall convey all right, title, and interest of the United States in and to the
15 Federal land to Resolution Copper.”).

16 22. The exchange parcel to be conveyed to Resolution Copper includes not only
17 the Oak Flat Withdrawal Area but also Forest Service surface lands that lie above the
18 copper deposit subsurface. This collective 2,422-acre tract of land is known as the “Oak
19 Flat Federal Parcel” in the NDAA.

20 23. Although Congress directed the Forest Service to exchange the federal
21 parcels at and around Oak Flat as described in the NDAA, Congress required all federal
22 agencies to otherwise comply with all applicable laws, for both the review and approval of
23 the Exchange, as well as for Resolution’s plans for facilities related to the Mine, such as
24 tailings impoundments, mine shafts, pipelines, electrical transmission lines and facilities,
25 roads, water use, and other activities.

26 24. The NDAA also placed significant restrictions on the Forest Service’s
27 approval of the Exchange and Resolution’s mining infrastructure plans, including that a
28 single FEIS that is fully compliant with all federal laws, including the National

1 Environmental Policy Act (“NEPA”), 42 U.S.C. 4321 *et seq.*, is to be the basis for all
2 decisions under federal law related to the Exchange and the Mine. *See* NDAA §3003(c)(9)
3 (“the Secretary shall carry out the land exchange in accordance with the requirements of the
4 National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*)”

5 25. According to the NDAA:

6 Prior to conveying Federal land under this section, the Secretary shall
7 prepare a single environmental impact statement under the National
8 Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), which shall
9 be used as the basis for all decisions under Federal law related to the
10 proposed mine and the Resolution mine plan of operations and any
11 related major Federal actions significantly affecting the quality of the
12 human environment, including the granting of any permits, rights-of-
way, or approvals for the construction of associated power, water,
transportation, processing, tailings, waste disposal, or other ancillary
facilities.

13 §3003(c)(9).

14 26. Thus, the agency cannot defer or postpone the review of any aspect of the
15 Exchange or the Project to a future public or agency process, as Congress directed that all
16 aspects be analyzed in “a single environmental impact statement.” *Id.* Yet as shown herein,
17 that is what the Forest Service has done, by deferring and postponing full consideration of
18 the baseline conditions, connected actions, direct, indirect, and cumulative impacts,
19 mitigation measures and analysis, and other aspects of the Exchange and Project.

20 27. Notably, the NDAA did not authorize, require, or otherwise direct the Forest
21 Service or any other agency to approve the mine plan of operations (“PoO”) (also called the
22 General Plan of Operations (“GPO”)), Special Uses, Rights-of-Way (“ROWs”), Clean
23 Water Act Section 404 permit, or any other permits or approvals required for the Project’s
24 infrastructure and facilities.

25 28. Another critical limiting factor for this Exchange is Congress’ express
26 requirement that the Forest Service cannot approve the Exchange until the lands to be
27 obtained by Resolution (known as the “Federal Land”) and the lands to be obtained by the
28

1 federal government (known as the “Non-Federal Land”) are subject to completed
2 appraisals.

3 29. The FEIS’ and the Forest Service’s review of the Exchange and Project are
4 legally deficient despite §3003(c)’s requirement that all agencies comply with federal laws
5 including NEPA.

6 30. The Forest Service relied on the FEIS to issue, also on January 15, 2021, a
7 Draft Record of Decision (“DROD”) for the Project. As shown herein, the FEIS
8 improperly limited its review based on an incorrect analysis of the Agency’s authority over
9 the Project and its related facilities and activities that was the basis for the DROD.

10 31. Plaintiffs seek vacatur and declaratory and injunctive relief against the Forest
11 Service and Federal Defendants. Federal Defendants’ actions and decisions fail to comply
12 with applicable law, are arbitrary, capricious, an abuse of discretion, not in accordance with
13 the law, in excess of statutory authority, and without observance of the procedure required
14 by law and, thus, should be set aside. 5 U.S.C. § 706(2).

15 32. Recently, two separate lawsuits have been filed in this District challenging
16 the Forest Service’s actions and inactions regarding the Exchange and Project. *See Apache*
17 *Stronghold v. United States of America*, 21-CV-00050-SPL (filed January 12, 2021); *San*
18 *Carlos Apache Tribe v. U.S. Forest Service*, 21-CV-00068-DWL (filed January 14, 2021).

19 **JURISDICTION AND VENUE**

20 33. This suit challenges the Forest Service’s failure to comply with mandatory
21 procedural and substantive requirements of federal law. These violations include failure to
22 comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”);
23 Section 3003 of the NDAA; the Forest Service Organic Administration Act of 1897, 16
24 U.S.C. §§ 475, 478, 551 (“Organic Act”); the Federal Land Policy and Management Act of
25 1976, 43 U.S.C. §§ 1701 *et seq.* (“FLPMA”); the Administrative Procedure Act (“APA”), 5
26 U.S.C. §§ 701-706, and the implementing regulations and policies of these laws.

27 34. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal
28 question), § 2201 (declaratory relief), and § 2202 (injunctive relief).

1 O'odham Nation, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-
2 Apache Nation, the Yavapai-Prescott Indian Tribe, and the Zuni Tribe.

3 40. Plaintiff Access Fund is the national advocacy organization that works to
4 keep U.S. climbing areas open and conserves the climbing environment. Founded in 1990,
5 the Access Fund works with more than 135 affiliated local climbing organizations around
6 the country in supporting and representing more than 7 million climbers nationwide in all
7 forms of climbing: rock, ice, mountaineering, and bouldering.

8 41. Plaintiff Center for Biological Diversity ("Center") is a non-profit public
9 interest organization with headquarters located in Tucson, Arizona, representing more than
10 80,000 members dedicated to the conservation and recovery of threatened and endangered
11 species and their habitats. The Center works through science, law, and policy to secure a
12 future for all species, great or small, hovering on the brink of extinction. The Center has
13 long-standing interest in projects of ecological significance undertaken in the National
14 Forests of the Southwest, including proposed mining projects.

15 42. Plaintiff Earthworks is a nonprofit organization dedicated to protecting
16 communities and the environment from the adverse impacts of mineral and energy
17 development while promoting sustainable solutions. Earthworks stands for clean air, water
18 and land, healthy communities, and corporate accountability. Earthworks supports
19 solutions that protect both the Earth's resources and our communities.

20 43. Plaintiff Sierra Club is one of the nation's oldest and most influential
21 grassroots organizations whose mission is "to explore, enjoy, and protect the wild places of
22 the earth; to practice and promote the responsible use of the earth's ecosystems and
23 resources; and to educate and enlist humanity to protect and restore the quality of the
24 natural and human environments." Sierra Club has more than 2.4 million members and
25 supporters with 35,000 in Arizona as part of the Grand Canyon (Arizona) Chapter. Its
26 members have long been committed to protecting and enjoying the Tonto National Forest.

27 44. Plaintiffs have long-standing interests in the proper and lawful management
28 of the National Forests, especially the Tonto National Forest near and adjacent to the town

1 of Superior, including the lands within the Project and Exchange area. Plaintiffs also have
2 long-standing interests in the proper implementation of NEPA and federal public land
3 management laws. Members, officers, staff, and supporters of Plaintiffs participate in a
4 wide range of aesthetic, scientific research, recreational, commercial, and traditional,
5 religious and cultural activities on the Tonto National Forest and within and adjacent to the
6 lands proposed to be impacted by the Exchange and Project activities reviewed in the FEIS.

7 45. Plaintiffs' members, officers, staff, and supporters hike, rock climb, guide
8 commercial clients, picnic, conduct cultural and religious ceremonies, appreciate scenery,
9 solitude, and quiet, engage in scientific research projects, and view and value wildlife, in
10 the lands at the site of the Exchange, Project operations, and related infrastructure,
11 including waters adversely affected by the Exchange and Project (such as Ga'an Canyon,
12 Queen Creek, Mineral Creek, and springs and seeps that will suffer severe loss or
13 elimination of flows). Plaintiffs' members, officers, staff, and supporters have concrete
14 plans to continue pursuing these activities on the specific lands and transportation and
15 infrastructure routes impacted by the Exchange and Project operations. These uses will be
16 immediately and irreparably diminished or eliminated altogether by the Exchange and
17 Project operations. Many of Plaintiffs' members live in the town of Superior and in Queen
18 Valley near the Project area that will be adversely affected by the Exchange and the Project,
19 while the Mine and all of its infrastructure would exist within the ancestral lands of ITAA's
20 Member Tribes.

21 46. Plaintiffs fully participated in the Agency's public review process and
22 submitted detailed comments during the Forest Service review of the Exchange and Project,
23 including hundreds of pages of comments, with exhibits, on the Draft EIS in 2019.
24 Plaintiffs submitted additional comments, information, and exhibits to the Forest Service in
25 2020 prior to the issuance of the FEIS. The Forest Service's failure to properly and fully
26 involve the public during the FEIS and Exchange and Project review process has violated
27 Plaintiffs' and their members' procedural rights under NEPA, FLPMA, the APA, Section
28 3003 of the NDAA, and related laws and regulations.

1 47. The interests of Plaintiffs and their members, officers, staff, and supporters
2 in this matter are substantial and are adversely affected by Defendants' failure to comply
3 with NEPA, Section 3003 of the NDAA, FLPMA, the 1897 Organic Act, the APA, and by
4 the Exchange and Project activities. The requested relief will redress the injuries of the
5 Plaintiffs, and their members, officers, staff, and supporters.

6 48. The failure of the Federal Defendants to comply with the public and agency
7 review requirements of NEPA, Section 3003 of the NDAA, FLPMA, Organic Act, and
8 their implementing regulations also adversely affects and injures Plaintiffs and their
9 members' ability to fully participate in the agency's decision-making as mandated by these
10 laws.

11 49. Defendant, United States Forest Service, is a federal agency within the U.S.
12 Department of Agriculture. The Forest Service is responsible for the management of the
13 National Forests, including the Tonto National Forest. As part of its management
14 responsibility, the Forest Service must ensure that activities it reviews and authorizes on the
15 Tonto National Forest comply with NEPA, FLPMA, the Organic Act, the APA, and the
16 other federal laws noted herein. On January 15, 2021, the Tonto National Forest issued the
17 challenged FEIS. Mr. Bosworth and Mr. Torres have management responsibilities for the
18 Tonto National Forest and are responsible for the issuance of the FEIS and Draft ROD, and
19 are sued in their official capacities.

20 21 **The Massive Size, Scale, and Impacts of the Resolution Project**

22 50. Resolution Copper is proposing to develop one of the largest mining projects
23 in U.S. history. Resolution's Project includes the mine site itself, as well as associated
24 infrastructure, large power transmission lines, dewatering operations, numerous high-
25 capacity groundwater pumping wells, waste and ore concentrate delivery pipelines,
26 transportation corridors and roads, and a massive tailings waste storage facility.

27 51. According to the Forest Service: "it is expected that one of the largest copper
28 mines in the United States would be established on the exchange parcel, with an estimated

1 surface disturbance of 6,951 acres (approximately 11 square miles). It would also be one of
2 the deepest mines in the United States, with mine workings extending 7,000 feet beneath
3 the surface.” FEIS at 3.

4 52. “The project would progress through three distinct phases: construction
5 (mine years 1 to 9), operations, also referred to as the production phase (mine years 6 to
6 46), and reclamation (mine years 46 to 51–56).” FEIS at ES-3.

7 53. Resolution would mine:

8 1.4 billion tons of ore and produce[] 40 billion pounds of copper using a
9 mining technique known as panel caving. Using this process, a network
10 of shafts and tunnels is constructed below the ore body. Access to the
11 infrastructure associated with the panel caving would be from vertical
12 shafts in an area known as the East Plant Site, which would be
13 developed adjacent to the Oak Flat Federal Parcel. This area would
include mine shafts and a variety of surface facilities to support mining
operations. This area currently contains two operating mine shafts, a
mine administration building, and other mining infrastructure.

14 FEIS at ES-3.

15 54. “The type of copper deposit that would be mined at the East Plant Site is a
16 porphyry deposit, a lower-grade deposit that requires higher mine production rates to be
17 economically viable. The copper deposit that Resolution Copper proposes to mine averages
18 1.54 percent copper (i.e., every ton of ore would on average contain 31 pounds of copper).”
19 FEIS at ES-7.

20 55. Ore processing would take place outside the town Superior, in an area
21 known as the “West Plant Site.” FEIS at ES-7. “Mined ore would be crushed underground
22 and then transported underground approximately 2.5 miles west to an area known as the
23 West Plant Site, where ore would be processed to produce copper and molybdenum
24 concentrates.” Id.

25 56. As a result, Oak Flat and the entire area:

26 would be permanently altered by large-scale ore removal and geological
27 subsidence. The resulting 7,000-foot-deep area of fractured rock and
28 approximately 1.8-mile-wide subsidence crater at the surface of Oak Flat,
together with ongoing mine dewatering, would be likely over time to result

1 in measurable reductions in flows in Devil’s Canyon and Queen Creek and
2 the long-term loss of some seeps and springs in the Superior area.

3 FEIS at 41.

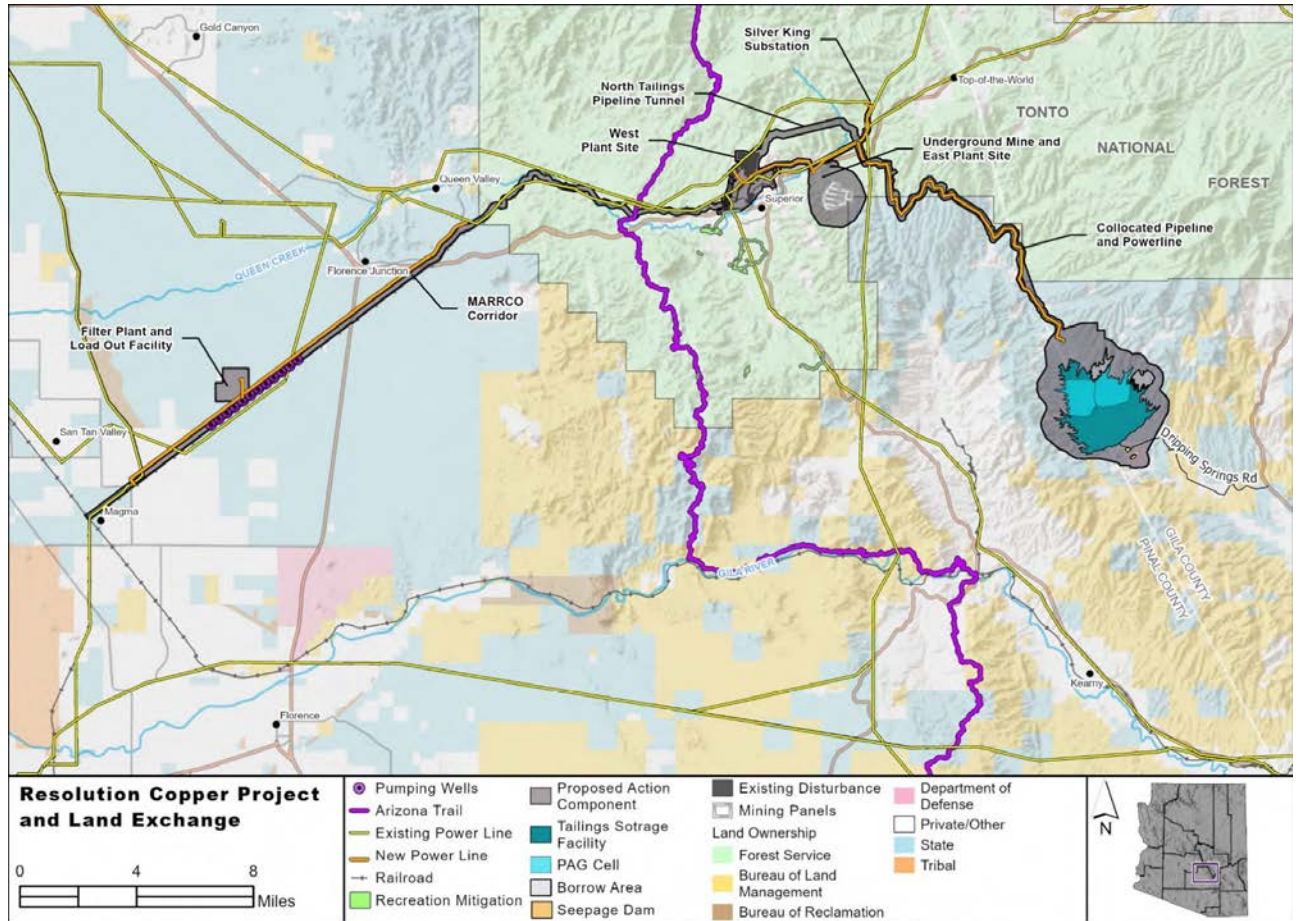
4 57. A massive tailings storage facility would contain the waste material left over
5 after processing. Under the Agency’s chosen alternative for the tailings waste facility and
6 associated infrastructure in an area known as “Skunk Camp,” the tailings dump “with the
7 revised pipeline/power line corridor, would include approximately 14,950 acres of
8 disturbance, of which 2,467 acres is NFS [National Forest Service] land, 8,218 acres is
9 ASLD [Arizona State Land Department] managed, and 4,265 acres is private land.” FEIS at
10 118.

11 58. “The tailings storage facility also presents risks to the watershed through the
12 potential for contaminants from metals or chemicals in tailings seepage to escape controls
13 and enter groundwater and/or downstream surface waters, thereby potentially threatening
14 riparian areas and other wildlife habitats, human uses, and waters provided to livestock.”
15 FEIS at 41.

16 59. Pipelines would be constructed to transport the tailings waste from the ore
17 processing facility in the form of a slurry to the tailings storage facility. Thickened slurry
18 would be pumped in two streams to the tailings storage facility, and a recycled water
19 pipeline would return water to the processing loop at West Plant Site, all within a 19 mile
20 corridor from the West Plant Site to the tailings storage facility. FEIS at 127.

21 60. On the west side of the Project, the ore concentrate (materials remaining
22 after the tailings waste has been extracted) would be delivered via another large pipeline for
23 further processing. “Once processed, the copper concentrate would be pumped as a slurry
24 through a 22-mile pipeline to a filter plant and loadout facility located near Florence
25 Junction, Arizona, where copper concentrate would be filtered and then sent to off-site
26 smelters via rail cars or trucks. The molybdenum concentrate would be filtered, dried, and
27 sent to market via truck directly from the West Plant Site.” FEIS at ES-7.
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61. The FEIS provides an overview map of the Agency’s preferred alternative, showing the massive scale of the overall Project:



FEIS at 120, Figure 2.2.8-1.

62. Notably, although the Forest Service proposes to issue a Special Use Permit for the 19-mile pipeline to carry the tailings waste to the Skunk Camp site (towards the southeast of the Mine site), the Agency is not requiring any such Permit for the 22-mile ore concentrate pipeline heading southwest past Florence Junction, a large portion of which crosses Forest Service managed public land. This is despite the fact that the Agency required Resolution to obtain a Special Use Permit for the installation of a previous water pipeline in the same corridor in 2008.

63. The estimated total quantity of water needed for the life of the mine (construction through closure) is huge, ranging from up to 677,000 acre-feet (“AF”) as

1 analyzed in the FEIS to as much as 786,626 AF, as shown in Figures 3.6-1a, 3.6-1b, and
2 3.6-1 of Resolution Copper's original GPO, V-2.

3 64. The water would be consumed from various sources over the life of the
4 Mine, including from mine dewatering and groundwater pumping. Much of the water to be
5 consumed by the Mine (at least 550,000 AF under the Agency's preferred alternative)
6 would be pumped from the groundwater underlying the company's proposed Desert
7 Wellfield to be located in the heart of the East Salt River Valley.

8 65. The FEIS does not disclose or analyze how much of the water pumped from
9 the Desert Wellfield will be legally determined to represent the recovery of long term
10 storage credits ("LTSC") or other rights associated with Resolution Copper's banking of
11 Central Arizona Project ("CAP") water or from water stored in the New Magma Irrigation
12 Drainage District's ("NMIDD") groundwater savings facility.

13 66. An acre-foot of water equals roughly 325,851 gallons. Under even the most
14 conservative estimates, under the preferred alternative (Alternative 6) the Mine would
15 consume at least **256 billion gallons** of water.

16 67. Arizona has been experiencing decades of drought, with the most intense
17 period of drought experienced in December 2020, with over 70% of Arizona under an
18 "exceptional drought" (the worst drought possible). Making matters worse, the Colorado
19 River, which provides a primary source of water for Maricopa, Pinal, and Pima Counties
20 through the CAP, is facing significant shortages due to a structural deficit, ongoing drought,
21 and years of declining snowpack in the Colorado River Basin.

22 68. Although all mining would be conducted underground, removing the ore
23 would cause the ground surface to collapse, creating a subsidence area at the Oak Flat
24 Federal Parcel. The crater would start to appear in year six of active mining. The crater
25 ultimately is projected to be between 800 and 1,115 feet deep and roughly 1.8 miles across.
26 FEIS at 63. The "Total Area of Subsidence" would be 1,751 acres. FEIS at 63.

27 69. The crater would also likely create a pit lake or lakes, resulting in additional
28 losses to the region's groundwater supplies, as water would continuously migrate into the

1 lake/lakes from the shallow alluvial aquifer and from other sources, and then evaporate
2 over time, likely forever.

3 70. The Exchange and Project would, *inter alia*, significantly and irreversibly
4 impact and adversely affect the recreational, scenic, wildlife habitat, conservation, scientific
5 and other related values of this region for all of those who visit, use, and enjoy the Oak Flat
6 and surrounding area, including the members of the Plaintiffs.

7 71. Under the Exchange, the Oak Flat federal lands would leave federal
8 jurisdiction, significantly reducing wildlife and other protections on these lands as the
9 National Forest Management Act, Tonto National Forest Land and Resource Management
10 Plan, critical provisions of the Endangered Species Act, and related federal laws would no
11 longer apply. *See* FEIS at 570.

12 72. The initial construction of the Mine would also cause impacts to all wildlife
13 groups found within the analysis area (including amphibians, birds, fish, invertebrates,
14 mammals, and reptiles) through the loss, degradation, and fragmentation of breeding,
15 rearing, foraging, and dispersal habitats; collisions with and crushing by construction
16 vehicles; the loss of burrowing animals where grading would occur; increased invasive and
17 noxious weeds; increased edges of vegetation blocks; and impacts from increased noise and
18 vibration levels. FEIS at 573-74.

19 73. The operation of the Mine would cause additional impacts to wildlife
20 including impacts associated with subsidence; the reduction in surface water flows and
21 groundwater availability to support riparian habitats; habitat changes from noxious and
22 invasive weed establishment and spread; and the presence of workers and equipment. FEIS
23 at 575.

24 74. The massive water needs of the Mine would reduce water throughout
25 regional aquifers and reduce surface water and groundwater levels downstream of the mine
26 in Ga'an Canyon and Queen Creek. FEIS at 575. Surface water amounts would be reduced,
27 and the timing and persistence of surface water would decrease. *Id.* This would, among
28

1 other things, reduce or remove wildlife habitat in areas along Ga'an Canyon and Queen
2 Creek, and around springs. Id.

3 75. The Forest Service purports in the FEIS that impacts to wildlife would be
4 mitigated by “replacing water sources for any riparian areas associated with springs or
5 perennial streams (groundwater-dependent ecosystems) impacted by the drawdown from
6 the mine dewatering and block caving.” FEIS at 598. Yet, the FEIS only identifies
7 potential actions that could be used to replace water sources and makes these potential
8 actions dependent on “monitoring reach[ing] a specified trigger.” FEIS at 598: Appendix J,
9 J-17-18. This trigger has not been identified, much less analyzed for effectiveness within
10 the FEIS for mitigating impacts anticipated from reduced surface water flows and
11 groundwater level draw down. See id.

12 76. Moreover, although the FEIS identifies “[a] variety of potential actions that
13 could be used to replace” such water sources, there is no substantive analysis of the
14 effectiveness of such measures despite NEPA requiring as much. See id.

15 77. The FEIS fails to fully review the impacts from the Project on wildlife and
16 fails to provide any reasonable mitigation plan to prevent these impacts. For example, the
17 Agency admits that avian species may use the seepage ponds in the Project area. FEIS at
18 576. But the concentration of pollution in the seepage ponds is expected to be above
19 chronic exposure limits, and some acute exposure limits, which could result in short- and
20 long-term impacts on avian species, with the impacts the most severe if they are exposed
21 over an extended period of time. Id.

22 78. Further, the tailings storage facility recycled water ponds represent large
23 areas with persistent water, which would attract wildlife in the desert environment. FEIS at
24 583. The ponds would likely have some constituents with concentrations above Arizona
25 water quality standards for wildlife, and thereby impact wildlife including birds. Id.

26 79. The tailings storage facility seepage collection ponds, near the tailings
27 storage facility, would persist for many years or decades after closure of the mine. FEIS at
28

1 583-84. Over time, the water quality in these ponds is expected to worsen, and would be
2 dangerous to wildlife including birds. FEIS at 584.

3 80. Uncovered process ponds at the West Plant Site would also represent
4 potential exposure to poor water quality for wildlife species, including primarily birds.
5 FEIS at 584.

6 81. For birds, including migratory species, the noise and vibration associated
7 with construction activities could temporarily change habitat use patterns for some species.
8 FEIS at 578. Raptors could be especially susceptible to noise disturbance early in the
9 breeding season, through nest abandonment and reduction in overall success. Id.

10 82. The Project could cause additional harm, disturbance, and death to birds
11 through potential electrocution and from striking electrical distribution lines. FEIS at 578.

12 83. Impacts to migratory birds from artificial light increases at night can also
13 cause injury or death from collisions with structures, reduced energy stores due to delays or
14 altered routes, and delayed arrival at breeding grounds. FEIS at 579.

15 84. The impacts to migratory birds from the mine construction, mine operation,
16 and maintenance activities would likely impact individual birds and local migratory bird
17 populations. FEIS at 579. Population-level impacts would likely be greater for species that
18 breed in the analysis area. Id. The FEIS does not disclose which of the over 170 avian
19 species that have been documented at Oak Flat or which of the 34 special status avian
20 species that would be potentially impacted could fall into this category. Nor does the FEIS
21 discuss the effectiveness of any proposed mitigation that may be implemented in avoiding
22 or minimizing negative impacts. FEIS at 585-88; id. at 613.

23 85. Although the FEIS identifies some potential mitigation measures for avian
24 species, such as rubber balls that could be used to deter or prevent birds from using process
25 water, seepage, and recycled water ponds, there is no substantive analysis as to their
26 effectiveness, instead the FEIS merely asserts, without evidentiary support, their
27 “effectiveness.” FEIS at 598-599. The FEIS repeats this same error for lighting, noise, and
28

1 other impacts from the proposed mine (identifying mitigation measures, not analyzing
2 them, and then pronouncing them “effective”). FEIS at 598, FS-WI-01.

3 86. The mine would also cause adverse impacts to fish, including mortality from
4 loss or modification of habitat, due to changes in groundwater elevation and contribution to
5 surface flows. FEIS at 579. These impacts would have the greatest potential to impact fish
6 species along areas of Ga’an Canyon and Queen Creek that currently have surface flows.

7 Id.

8 87. The yellow-billed cuckoo, which is designated as threatened with extinction,
9 may occur within the analysis area along Ga’an Canyon and Mineral Creek. FEIS at 591.

10 The Mine could cause a loss of habitat for the cuckoo along Ga’an Canyon and Mineral
11 Creek through reduced surface flows. Id. Potential habitat changes include the loss of
12 riparian habitat and a conversion of habitat to a drier, xeroriparian habitat (desert washes),
13 which could cause habitat to become unsuitable for nesting by the species. Id.

14 88. The removal of vegetation and impacts from workers and equipment also
15 could lead to the avoidance of the disturbed area and vicinity by the yellow-billed cuckoo.
16 FEIS at 591. In addition, the potential impacts on the cuckoo’s proposed critical habitat
17 includes the removal of riparian woodlands, including potentially suitable nesting, foraging,
18 and dispersal habitat, and a corresponding reduction in the prey base for the species. Id.

19 89. The southwestern willow flycatcher is also designated as endangered with
20 extinction under the federal Endangered Species Act and has designated critical habitat in
21 the analysis area that could be impacted by the Project. FEIS at 593.

22 90. The Gila chub is also designated as endangered with extinction and has
23 designated critical habitat along Mineral Creek. FEIS at 594. Potential impacts on the Gila
24 chub include habitat modification and potential changes to water quality, and potential
25 impacts on the designated critical habitat includes the reduction of perennial pools. Id.

26 91. The predicted acres of wildlife that could be impacted by the Project
27 include: 11,846 acres for the threatened western yellow-billed cuckoo; 41,818 acres for the
28 endangered southwestern willow flycatcher; 95,867 acres for the American peregrine

1 falcon; 86,474 acres for the bald eagle; 77,158 acres for the golden eagle; 27,119 acres for
2 the western burrowing owl; 431 acres for the endangered Gila chub; 95,943 acres for the
3 Monarch butterfly; and 94,381 acres for the Sonoran desert tortoise. FEIS at 585-89.

4 92. USFS fails to demonstrate in the FEIS how the Exchange and Mine Project
5 would comply with the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711, or the Bald and
6 Golden Eagle Protection Act, 16 U.S.C. §§ 668-668c. *See* 40 C.F.R. § 1502.2(d) (requiring
7 an EIS to state how alternatives and decisions “will or will not achieve the requirements of .
8 . . . other environmental laws and policies.”) as well as Forest Service requirements for
9 wildlife protection under the Organic Act and implementing regulations.

10 **Statutory and Regulatory Requirements Under NEPA and the NDAA**

11 93. NEPA is our “basic national charter for protection of the environment.” 40
12 C.F.R. § 1500.1(a). NEPA “prevent[s] or eliminate[s] damage to the environment and
13 biosphere by focusing government and public attention on the environmental effects of
14 proposed agency action.” Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 371 (1989).

15 94. NEPA recognizes that “each person should enjoy a healthful environment,”
16 and was enacted to ensure that the federal government uses all practicable means to “assure
17 for all Americans safe, healthful, productive, and esthetically and culturally pleasing
18 surroundings,” and to “attain the widest range of beneficial uses of the environment without
19 degradation, risk to health or safety, or other undesirable and unintended consequences,”
20 among other policies. 42 U.S.C. § 4331(b).

21 95. By focusing the agency’s attention on the environmental consequences of the
22 proposed action, NEPA “ensures that important effects will not be overlooked or
23 underestimated only to be discovered after resources have been committed or the die
24 otherwise cast.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).
25 *See also* 42 U.S.C. § 4332(2)(C).

26 96. “NEPA procedures must ensure that environmental information is available
27 to public officials and citizens before decisions are made and before actions are taken.” 40
28 CFR § 1500.1(b). This review must be supported by detailed data and analysis –

1 unsupported conclusions violate NEPA. *See Idaho Sporting Congress v. Thomas*, 137 F.3d
2 1146, 1150 (9th Cir. 1998); *N. Plains v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir.
3 2011)(conclusions must be supported by reliable studies).

4 97. NEPA requires federal agencies to fully consider the environmental
5 consequences of their actions. *See* 42 U.S.C. § 4331 *et seq.* NEPA ensures that the agency
6 will have available, and will carefully consider, detailed information concerning significant
7 environmental impacts; it also guarantees that the relevant information will be made
8 available to a larger audience to ensure the public can play a role in both the decision
9 making process and the implementation of the agency’s decision. 42 U.S.C. § 4332(2)(C);
10 40 C.F.R. §§ 1502.1, 1502.16. Congress enacted NEPA to ensure that federal agencies,
11 before approving a project, (1) consider and evaluate all environmental impacts of their
12 decisions and (2) disclose and provide an opportunity for the public to comment on such
13 environmental impacts. 40 C.F.R. §§ 1501.2, 1502.5.

14 98. NEPA requires federal agencies to prepare a detailed “Environmental Impact
15 Statement” (“EIS”) for any major Federal action that may significantly affect the quality of
16 the environment. 42 U.S.C. § 4332(2)(C). NEPA also requires federal agencies to study,
17 develop, and describe appropriate alternatives to recommended courses of action for any
18 proposal that involves unresolved conflicts concerning alternative uses of available
19 resources. 42 U.S.C. § 4332(2)(E).

20 99. The Council on Environmental Quality (“CEQ”) promulgated uniform
21 regulations to implement NEPA that are binding on all federal agencies. 40 C.F.R. Part
22 1500.³

23 100. NEPA requires that “environmental information is available to public
24 officials and citizens before decisions are made and before actions are taken.” 40 C.F.R.
25 §1500.1(b). Under NEPA, USFS must consider (1) “the environmental impact of the

26 ³ The CEQ recently revised its national NEPA regulations, which became effective on
27 September 14, 2020. 85 Fed. Reg. 43304-43376 (July 16, 2020). Because USFS conducted
28 its NEPA review for this project before the new regulations became effective, the CEQ
NEPA regulations existing prior to September 14, 2020, at 40 C.F.R. Part 1500, apply to the
Exchange, Project, and this Court’s review.

1 proposed action,” (2) “any adverse environmental impacts that cannot be avoided,” (3)
2 “alternatives to the proposed action,” (4) “the relationship between local short-term uses
3 . . . and the maintenance and enhancement of long-term productivity,” and (5) “any
4 irreversible and irretrievable commitments of resources.” 42 U.S.C. § 4332(2)(C).

5 101. An EIS is required to “provide full and fair discussion of significant
6 environmental impacts and shall inform decisionmakers and the public of the reasonable
7 alternatives which would avoid or minimize adverse impacts or enhance the quality of the
8 human environment.” 40 C.F.R. § 1502.1.

9 102. An EIS must include a full and adequate analysis of environmental impacts
10 of a project and alternatives and take a “hard look” at the direct, indirect, and cumulative
11 impacts of the project and its alternatives, resulting from all past, present, and reasonably
12 foreseeable future actions. Id. §§ 1508.7, 1508.8, 1508.9, 1508.25(c). An “effect” as used
13 in NEPA and its implementing regulations “includes ecological . . . , aesthetic, historic,
14 cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. §
15 1508.8(b).

16 103. Direct effects are caused by the action and occur at the same time and place
17 as the proposed project. 40 C.F.R. § 1508.8(a). Indirect effects are caused by the action and
18 are later in time or farther removed in distance, but are still reasonably foreseeable. Id. §
19 1508.8(b). Types of impacts include “effects on natural resources and on the components,
20 structures, and functioning of affected ecosystems,” as well as “aesthetic, historic, cultural,
21 economic, social or health [effects].” Id.

22 104. Cumulative effects/impacts are defined as:

23 [T]he impact on the environment which results from the incremental impact
24 of the action when added to other past, present, and reasonably foreseeable
25 future actions regardless of what agency (Federal or non-Federal) or person
26 undertakes such other actions. Cumulative impacts can result from
27 individually minor but collectively significant actions taking place over a
28 period of time.

40 C.F.R. § 1508.7.

1 105. “[A]n agency is required to consider more than one action in a single EIS if
2 they are ‘connected actions,’ ‘cumulative actions,’ or ‘similar actions.’” Kleppe v. Sierra
3 Club, 427 U.S. 390, 408 (1976). “[P]roposals for . . . actions that will have cumulative or
4 synergistic environmental impact upon a region . . . pending concurrently before an agency
5 . . . must be considered together. Only through comprehensive consideration of pending
6 proposals can the agency evaluate different courses of action.” Kleppe, 427 U.S. at 410.
7 When preparing an EIS, an agency must consider all “connected actions,” “cumulative
8 actions,” and “similar actions.” 40 C.F.R. §1508.25(a).

9 106. Here, all of the Project activities and facilities are “connected actions,”
10 and/or “cumulative actions” under NEPA and the NDAA.

11 107. The requirement that the Forest Service use a single EIS for its review of all
12 aspects of the Exchange and Mine Project is expressly mandated by Congress in §
13 3003(c)(9)(B) of the NDAA (128 STAT. 3735):

14 [p]rior to conveying Federal land under this section, the Secretary [of
15 Agriculture] shall prepare a single environmental impact statement under
16 the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.),
17 which shall be used as the basis for all decisions under Federal law related
18 to the proposed mine and the Resolution mine plan of operations and any
19 related major Federal actions significantly affecting the quality of the
20 human environment, including the granting of any permits, rights-of-way,
21 or approvals for the construction of associated power, water, transportation,
22 processing, tailings, waste disposal, or other ancillary facilities.

23 108. In addition, the establishment of the baseline conditions of the affected
24 environment is a fundamental requirement of the NEPA process, because an inadequate
25 environmental baseline precludes an accurate assessment of project impacts. Or. Nat.
26 Desert Ass’n v. Jewell, 823 F.3d 1258 (9th Cir. 2016). “[W]ithout [baseline] data, an
27 agency cannot carefully consider information about significant environment impacts. Thus,
28 the agency fails to consider an important aspect of the problem, resulting in an arbitrary and
capricious decision.” N. Plains Resource Council, Inc. v. Surface Transp. Bd., 668 F.3d
1067, 1085 (9th Cir. 2011).

1 109. NEPA also requires the Forest Service to fully analyze all mitigation measures,
2 their effectiveness, and any impacts that might result from their implementation. NEPA
3 regulations require that the agency’s environmental review: (1) “include appropriate
4 mitigation measures not already included in the proposed action or alternatives,” 40 C.F.R. §
5 1502.14(f); and (2) “include discussions of: . . . Means to mitigate adverse environmental
6 impacts (if not already covered under 1502.14(f)).” 40 C.F.R. § 1502.16(h). The FEIS failed
7 to fully evaluate the effectiveness and impacts of mitigation measures for the Exchange and
8 Mine Project.

9 110. “All relevant, reasonable mitigation measures that could improve the project
10 are to be identified, even if they are outside the jurisdiction of the lead agency or the
11 cooperating agencies” *Forty Most Asked Questions Concerning CEQ’s National*
12 *Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981).
13 NEPA requires that the Forest Service review mitigation measures as part of the NEPA
14 process—not in some future decision shielded from public review. 40 C.F.R. § 1502.16(h).

15 111. NEPA also requires that: “Environmental impact statements shall state how
16 alternatives considered in it and decisions based on it will or will not achieve the
17 requirements of sections 101 and 102(1) of the Act [NEPA] and other environmental laws
18 and policies.” 40 C.F.R. § 1502.2(d).

19 112. The FEIS fails these duties, as it never determined whether the Project and its
20 alternatives would fully “achieve . . . all relevant environmental laws and policies.” At a
21 minimum, the FEIS never analyzes: (1) whether, and how, federal public lands would be
22 fully protected under FLPMA’s right-of-way provisions and the protection of national forest
23 resources under the Organic Act, and the FLPMA and Organic Act implementing
24 regulations; (2) whether, and how, Native American cultural and religious resources and
25 uses would be protected; (3) whether, and how, there would be enough water available for
26 the Project and other uses in the area, without adversely affecting Arizona water users and
27 resources; (4) whether, and how, the Agency and Resolution would comply with substantive
28 State and Federal laws that mandate protection of wildlife, such as A.R.S. §17-236

1 (prohibiting the take or injury of any bird), and the federal Migratory Bird Treaty Act; (5)
2 how all Project facilities resulting from issuance of the special use permits comply with all
3 applicable federal and state environmental laws; and (6) how approving Special Use Permits
4 for the Project pipelines, transmission lines, and new roads would be “in the public interest”
5 and comply with the Forest Service Special Use Regulations at 36 C.F.R. Part 251 subpart
6 B and Part 261.

7 113. The NDAA also set out specific requirements for the required appraisals for
8 the Exchange. These appraisals “shall be conducted in accordance with nationally
9 recognized appraisal standards, including – (I) the Uniform Appraisal Standards for Federal
10 Land Acquisitions; and (II) the Uniform Standards of Professional Appraisal Practice.” §
11 3003(c)(4)(B)(i). “Before consummating the land exchange under this section, the
12 Secretary [of Agriculture] shall make the appraisals of the land to be exchanged (or a
13 summary thereof) available for public review.” § 3003(c)(4)(B)(iv).

14 114. The “final appraised values of the Federal land and non-Federal land” must
15 be “determined and approved by the Secretary.” § 3003(c)(4)(B)(ii).

16 115. The NDAA also requires that, based on the appraisals, “The value of the
17 Federal land and non-Federal land to be exchanged under this section shall be equal or shall
18 be equalized in accordance with this paragraph.” § 3003(c)(5)(A).

19 If the final appraised value of the Federal land exceeds the value of the non-
20 Federal land, Resolution Copper shall – (I) convey additional non-Federal
21 land in the State to the Secretary or Secretary of the Interior, consistent with
22 the requirements of this section and subject to the approval of the
23 applicable Secretary; (II) make a cash payment to the United States; or (III)
24 use a combination of the methods described in subclauses (I) and (II), as
25 agreed to by Resolution Copper, the Secretary, and the Secretary of the
26 Interior.

25 § 3003(c)(5)(B)(i).

26 116. The Non-Federal Lands to be conveyed to the United States are listed in §
27 3003(d). This list does not include the “additional non-Federal land in the State” that may
28 be conveyed to the United States pursuant to § 3003(c)(5)(B)(i).

1 117. Conveyance of the currently non-Federal land to the United States pursuant
2 to the Exchange only occurs if “the Secretary determines” the conveyance to each property
3 and interest “to be acceptable.” § 3003(d)(1)(A).

4 118. The transfer and conveyance of lands and interests pursuant to the Exchange
5 “shall” be done “simultaneously.” § 3003(d)(1).

6 119. Despite repeated requests from the public and Plaintiffs to provide this
7 mandatory public review of the appraisals and appraisal process as part of the Agency’s
8 preparation of the FEIS, the Agency refused to provide any meaningful information on the
9 appraisals to the public prior to issuance of the FEIS. No information on the appraisals was
10 included in the Draft EIS or FEIS.

11 120. There is no discussion in the FEIS regarding the “additional non-Federal
12 land in the State” that may be conveyed to the United States pursuant to §
13 3003(c)(5)(B)(i).

14 **The Forest Service’s Shifting Review of the Project**

15 121. At the 11th-hour, in late 2020 and roughly a year after the Forest Service
16 closed-off public comment on the Project, the Agency abruptly shifted its review and
17 permitting of the Project, from one governed by federal mining laws to one controlled by
18 public land “special use” requirements. Up until the issuance of the FEIS on January 15,
19 2021, the public was never informed of this regulatory switch and never had the
20 opportunity to review or comment on the Agency’s new permitting regime.

21 122. The FEIS summarized the Forest Service’s review of the Exchange and
22 Project as initially presented to the public, stating that its review was based on the
23 company’s General Mining Plan of Operations:

24
25 The Tonto National Forest, a unit of the Forest Service located in south-
26 central Arizona, prepared this environmental impact statement (EIS) to
27 disclose the potential environmental effects of the Resolution Copper
28 Project and Land Exchange (project). The project includes (1) the
Southeast Arizona Land Exchange (land exchange), a congressionally
mandated exchange of land between Resolution Copper Mining, LLC1
(Resolution Copper) and the United States; (2) approval of the “General

1 Plan of Operations” (GPO) for any operations on National Forest System
2 (NFS) land associated with a proposed large-scale underground mine
3 (Resolution Copper Project); and (3) amendments to the “Tonto National
4 Forest Land and Resource Management Plan” (forest plan) (1985, as
5 amended).

6 FEIS at 1.

7 123. Resolution submitted its GPO application in 2013, and “On March 18, 2016,
8 the Tonto National Forest issued a Notice of Intent to prepare an environmental impact
9 statement for the Resolution Copper Project and Land Exchange.” FEIS at 1. As stated by
10 the Agency, that Notice only considered approving the GPO and the Exchange. Id.

11 124. The Agency’s Draft EIS, issued in August 2019, continued with this
12 approach, limiting its review to the GPO and Exchange, with the addition of consideration
13 of a permit to “the Salt River Project [“SRP”] to authorize construction and operation of
14 power lines on NFS [National Forest Service] lands.” Draft EIS at ES-7.

15 125. The issuance of the Draft EIS resulted in a public comment period that ended
16 in November, 2019. That was the only opportunity for public review and comment on the
17 Agency’s review of the Exchange and Project.

18 126. Thus, throughout the Agency’s public review process, the Forest Service was
19 reviewing Resolution’s “General Plan of Operations” for all the Project’s facilities and
20 operations, and based the agency’s public notices and review on the GPO and under the
21 federal mining laws.

22 127. Yet, that is **not** what the Agency **now** presents to the public in the FEIS and
23 Draft ROD. Instead, the Agency now proposes, via the FEIS and the Draft ROD, not to
24 review or approve the GPO, but rather a series of “Special Use Permits” for the Project’s
25 pipelines, transmission lines, and new and reconstructed roads across federal Forest Service
26 managed lands. This is because, once the Exchange occurs, all of the Company’s proposed
27 uses on Forest Service managed lands are no longer related to mining operations on federal
28 land, as the mining would occur on the newly privatized lands.

128. These “Special Use Permits” were never subject to public review and
comment as NEPA and the NDAA require, as the applications were submitted by

1 Resolution Copper to the Forest Service long after the Draft EIS was issued and public
2 comment was foreclosed.

3 129. For example, Resolution only submitted its Special Use Permit application
4 for the tailings pipeline infrastructure on September 7, 2020. The Agency conducted a
5 cursory review and accepted the application just three weeks later. “Resolution Copper
6 submitted an SF-299 Special Use Permit application on September 7, 2020. Tonto National
7 Forest Staff carried out initial and secondary screenings and accepted the application on
8 September 28, 2020.” FEIS at Appendix Q-1.

9 130. The Forest Service’s review of the Salt River Project Special Use Permit for
10 high voltage transmission lines was even faster: “[Salt River Project] submitted an SF-299
11 Special Use Permit application on November 11, 2020. Tonto National Forest Staff carried
12 out initial and secondary screenings and accepted the application on November 18, 2020.”
13 FEIS at Appendix Q-1.

14 131. In its September 28, 2020 letter to Resolution, the Forest Service informed
15 the company that it had accepted the company’s Special Use Permit application for the
16 tailings pipeline infrastructure, rather than considering these proposed uses under the GPO.
17 Letter from Neil Bosworth, U.S. Forest Serv., to Resolution (Sept. 28, 2020)(reprinted in
18 Appendix Q).

19 132. Defendant Forest Service official Neil Bosworth stated:

20 I have reviewed your company’s proposal to construct, operate, and reclaim
21 a tailings pipeline infrastructure from Resolution Copper’s West Plant Site
22 (WPS) near Superior, Arizona across national forest system (NFS) lands
23 administered by the Tonto National Forest, to the proposed Skunk Camp
24 Tailings Storage Facility located on private and State trust lands in Gila
25 County Arizona. Based on the initial documents provided (i.e. cover letter,
26 SF-299, and attachment dated 9/07/2020), the proposal passes the first and
27 second level screening criteria as outlined in FSH 2709.11, Chapter 10. At
28 this time, we are prepared to accept your proposal as a formal application to
be fully evaluated pursuant to the National Environmental Policy Act
(NEPA), its implementing regulations, and agency NEPA procedures as
outlined in FSM 1950 and FSH 1909.15.

Sept. 28, 2020 letter at 1.

1 133. The Forest Service issued a similar letter to the Salt River Project on
2 November 18, 2020, signed by Defendant Tom Torres. In that letter, the Agency further
3 noted that the Salt River Project electrical facilities and corridor still required additional
4 review and its location had not been confirmed.

5 It is understood that this proposal is preliminary and additional design,
6 review, and other regulatory processes are required before an authorization
7 will be issued. It is also understood that the need for this use is reliant on
8 the proposed Resolution Copper Mine and will only be constructed if the
9 need is confirmed. It is assumed that the proposed high voltage
10 transmission line will be located within the 500 foot wide corridor defined
11 and analyzed in the EIS. However, if the design and other regulatory
12 processes have been completed and it is determined that the proposed high
13 voltage transmission line cannot be located within the analyzed corridor,
14 SRP shall submit a revised proposal and a complete review will be
15 required.

16 Nov. 18, 2020 letter at 1 (also reprinted in Appendix Q of the FEIS).

17 134. The Forest Service Special Use Regulations require that: “(ii) Federal, State,
18 and local government agencies and the public shall receive adequate notice and an
19 opportunity to comment upon a special use proposal accepted as a formal application in
20 accordance with Forest Service NEPA procedures.” 36 C.F.R. § 251.54(g)((2)(ii).

21 135. Apparently, sometime between the Forest Service’s issuance of the Draft
22 EIS for public review and the publication of the FEIS, the Agency changed its
23 consideration of the Project. In the DEIS (and even still in the FEIS), as noted above, the
24 Agency stated that the Project would be considered under the GPO submitted under the
25 Agency’s mining regulations (36 C.F.R. Part 228A). Now, the FEIS’s review of the Project
26 is under the Agency’s Part 251 Special Use regulations.

27 136. As the Draft ROD states, the Project activities reviewed in the FEIS are no
28 longer under the Forest Service’s review of a GPO pursuant to the Agency’s mining
regulations at 36 C.F.R. Part 228A. Instead:

Any associated uses of [National Forest Service] land for pipelines and
utilities are special uses and are regulated under 36 CFR 251.50 because
they are associated with mining on private property, and therefore do not
involve operations conducted under the United States Mining Laws.

1 Authorization for a special use or occupancy of NFS lands requires
2 submittal of a special use application (SF-299). This application process is
3 designed to ensure that authorizations to use and occupy NFS lands are in
4 the public interest (36 CFR 251, Subpart B).

5 Draft ROD at 4.

6 137. None of these “Special Use Permit applications” have been submitted for
7 public review and comment, as required by the Part 251 regulations.

8 138. The FEIS does not explain why the Agency refused to submit the 11th hour
9 Special Use Permit applications for public review.

10 139. In describing the two Special Use Permit applications, the Forest Service
11 stated: “Rather than submittal of a mine plan, authorization of special use or occupancy on
12 [National Forest Service] lands requires submittal of a special use application (SF-299).
13 This application process is designed to ensure that authorization to use and occupy
14 [National Forest Service] lands are in the public interest (36 CFR 251, Subpart B).” FEIS
15 Appendix Q-1.

16 140. The distinction between Forest Service review of a mining GPO and a
17 Special Use Permit is significant. For example, and as discussed further below, the Agency
18 does not consider whether the approval of a GPO is “in the public interest” but is required
19 to do such analysis and issue such a finding under the Part 251 regulations. Additionally,
20 as the Agency alleges (albeit incorrectly with respect to the Mine plan in this case), “there
21 is no discretion or decision to be made with respect to the land exchange or approval of a
22 mine plan,” however such discretion **does** exist for Special Use Permit applications as the
23 Forest Service has complete authority to approve or deny such applications. Draft ROD at
24 vi, n. 1; 36 C.F.R. § 251.54(e)(5).

25 141. The FEIS does not analyze whether the Project meets the “public interest”
26 test and other requirements under the Part 251 Regulations and their governing statutes,
27 such as FLPMA. The FEIS never reviewed the various Project alternatives under the
28 required “public interest” test. And, as noted, the public was never given an opportunity to

1 review and comment on the Special Use Permit applications prior to release of the FEIS in
2 contravention of federal laws.

3
4 **The Forest Service’s Special Use Requirements and Violations**

5 142. As noted above, the Forest Service now asserts that the Project (after the
6 Exchange) be solely governed by the Agency’s 36 C.F.R. Part 251 regulations governing
7 “Special Uses” of public land.

8 143. These regulations place strict requirements on the Agency’s review of the
9 Project, including mandatory public review requirements, which were not followed in this
10 case.

11 144. The Forest Service’s Special Use Regulations require that: “(ii) Federal,
12 State, and local government agencies and the public shall receive adequate notice and an
13 opportunity to comment upon a special use proposal accepted as a formal application in
14 accordance with Forest Service NEPA procedures.” 36 C.F.R. § 251.54(g)(2)(ii).

15 145. These regulations also require that:

16 [T]he authorized officer shall screen the proposal to ensure that the use meets the
17 following minimum requirements applicable to all special uses:

18 (i) The proposed use is consistent with the laws, regulations, orders, and
19 policies establishing or governing National Forest System lands, with other
20 applicable Federal law, and with applicable State and local health and
sanitation laws.

21 (ii) The proposed use is consistent or can be made consistent with standards
22 and guidelines in the applicable forest land and resource management plan
prepared under the National Forest Management Act and 36 CFR part 219.

23 (iii) The proposed use will not pose a serious or substantial risk to public
24 health or safety.

25 **(iv) The proposed use will not create an exclusive or perpetual right of
use or occupancy.**

26 **(v) The proposed use will not unreasonably conflict or interfere with
27 administrative use by the Forest Service, other scheduled or authorized
28 existing uses of the National Forest System, or use of adjacent non-
National Forest System lands.**

1 ...

2 **(ix) The proposed use does not involve disposal of solid waste or**
 3 **disposal of radioactive or other hazardous substances.**

4 36 C.F.R. § 251.54(e)(1) (emphasis added).

5 146. These regulations require a two-phase “screening process,” with a proposed
 6 use having to pass both levels. The first level requires compliance with the above (e)(1)
 7 criteria. If a proposed use satisfies this level, the Agency conducts a “second-level
 8 screening of proposed uses.”

9 *(5) Second-level screening of proposed uses.* A proposal which passes the
 10 initial screening set forth in paragraph (e)(1) and for which the proponent
 11 has submitted information as required in paragraph (d)(2)(ii) of this section,
 12 proceeds to second-level screening and consideration. In order to complete
 13 this screening and consideration, the authorized officer may request such
 14 additional information as necessary to obtain a full description of the
 15 proposed use and its effects. **An authorized officer shall reject any**
 16 **proposal, including a proposal for commercial group uses, if, upon**
 17 **further consideration, the officer determines that:**

18 **(i) The proposed use would be inconsistent or incompatible with the**
 19 **purposes for which the lands are managed, or with other uses; or**

20 **(ii) The proposed use would not be in the public interest; or**

21 (iii) The proponent is not qualified; or

22 (iv) The proponent does not or cannot demonstrate technical or economic
 23 feasibility of the proposed use or the financial or technical capability to
 24 undertake the use and to fully comply with the terms and conditions of the
 25 authorization; or

26 (v) There is no person or entity authorized to sign a special use
 27 authorization and/or there is no person or entity willing to accept
 28 responsibility for adherence to the terms and conditions of the
 authorization.

36 C.F.R. § 251.54(e)(5)(emphasis added).

147. As noted above, and as the Agency stated in the FEIS, it conducted all of this
 “screening” for both the Salt River Project and Resolution Special Use Permit
 applications—at both levels—in a matter of days or weeks just before the FEIS was issued.

148. The FEIS contains, little, if any, analysis as to how the Salt River Project and
 Resolution Special Use Permit applications comply with each of the many criteria needed

1 to be accepted by the Agency. And, as noted, it is undisputed that the Agency never
2 provided for any of the required public review and comment for these applications.

3 149. In addition, the FEIS acknowledges that the Project requires the construction
4 and operation of a 22-mile pipeline to transport the ore concentrate to the processing site
5 past Florence Junction, similar to the 19-mile pipeline (in the other direction) to the tailings
6 waste site in Skunk Camp. “Resolution Copper would then pump the copper concentrate as
7 a slurry through a 22-mile-long pipeline to a filter plant and loadout facility located near
8 Magma Junction near San Tan Valley, Arizona. They would then filter the copper
9 concentrate and send it to off-site smelters via rail cars or trucks.” FEIS at 11.

10 150. “Filtered copper concentrate would be loaded and shipped 7 miles along the
11 MARRCO corridor by rail car to Magma Junction where the rail line meets the Union
12 Pacific Railroad. Final smelter destination is unknown at this time.” FEIS at 77 (Table
13 2.2.2-6 “Existing and proposed mine access roads and traffic”).

14 151. The FEIS does not discuss or analyze where the smelting would then occur,
15 or any of the impacts (such as air pollution) from the smelting or rail/truck transport, as
16 required by NEPA and the NDAA.

17 152. The Agency also did not analyze, much less require as it needed to, that
18 Resolution obtain a Special Use Permits for its copper concentrate slurry pipeline that
19 would be located along an existing right-of-way known as the Magma Arizona Railroad
20 Company (“MARRCO”) corridor.

21 153. “The MARRCO corridor would also host other mine infrastructure,
22 including water pipelines, power lines, pump stations, and a number of wells for
23 groundwater pumping and recovery....” FEIS at 11.

24 154. The FEIS does not analyze this pipeline as a Special Use, as the Forest
25 Service never required Resolution to submit a Special Use Permit application for the
26 approximate 9 mile portion of this pipeline that would cross Forest Service managed public
27 land. In addition to the pipeline crossing Forest Service managed lands, Resolution would
28

1 build a “Construction Laydown Yard” purportedly within the MARRCO corridor on Forest
2 Service lands. FEIS at 73 (Figure 2.2.2-12, MARRCO Corridor facility layout).

3 155. Despite all the new infrastructure and facilities proposed to be constructed
4 and used in the MARRCO corridor, “[t]he corridor generally is 200 feet wide.” The FEIS
5 does not explain how all of the existing and new infrastructure and construction yard, plus
6 the access and support roads to service the new facilities, would fit within the mere 200-
7 foot-wide corridor.

8 156. Because these new facilities would be located in the old MARRCO right-of-
9 way issued to the railroad company in 1922, the Forest Service needed to analyze and
10 require a Special Use Permit application for these facilities.

11 157. Indeed, the Forest Service has in the past required as much, as it previously
12 required Resolution to obtain a Special Use Permit to install and operate a water pipeline
13 within the same MARRCO corridor in 2008. As the Forest Service stated in 2010:

14 The construction and operation of the MARRCO pipeline convey treated
15 water from the No. 9 Shaft to NMIDD [New Magma Irrigation and
16 Drainage District] for irrigation use. In response to RCM’s [Resolution
17 Copper’s] submitted request for a special use permit application, the Forest
18 Service recently evaluated information provided by RCM regarding the
19 construction of this pipeline within the MARRCO right-of-way and the
20 dewatering of the No. 9 Shaft. ... **The Forest Service recently granted a
21 special use permit for the construction and operation of the MARRCO
22 pipeline** (MES749).

23 Environmental Assessment (“EA”) for the Resolution Copper Mining Pre-Feasibility
24 Activities Plan of Operations signed by Tonto National Forest Supervisor Gene
25 Blankenbaker on May 14, 2010 (emphasis added).

26 158. In addition, under FLPMA and federal law, the Agency cannot increase the
27 uses in, and impacts from, the new facilities in the 1922 right of way without undertaking
28 the detailed agency and public reviews and permitting requirements under FLPMA Title V.
43 U.S.C. §§ 1761-1771. Yet no such FLPMA analysis and review has been done.

1 **The Forest Service Failed to Comply with NEPA and the NDAA**

2 **The Agency Reviewed the Project Under an Incorrect Legal Regime and Statement of the**
3 **“Purpose and Need” for Its Review.**

4 159. NEPA requires all EISs to contain a statement that specifies the underlying
5 purpose and need for which the agency is responding to when reviewing the proposed
6 action(s). 40 C.F.R. § 1502.13. The statement of purpose and need is crucially important
7 because it dictates the scope of the agency review and the range of reasonable alternatives
8 to the proposed action. City of Carmel-By-The-Sea v. U.S. Dep’t of Transp., 123 F.3d
9 1142, 1155 (9th Cir. 1997). The purpose and need statement cannot be so narrow as to
10 limit the range of reasonable alternatives. Id. at 1155 (“The stated goal of a project
11 necessarily dictates the range of reasonable alternatives and an agency cannot define its
12 objectives in unreasonably narrow terms.”); *see also* Nat’l Parks & Conservation Ass’n v.
13 Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010).

14 160. Agencies cannot avoid NEPA’s requirements by unreasonably restricting the
15 statement of purpose. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C.
16 Cir. 1991) (“an agency may not define the objectives of its action in terms so unreasonably
17 narrow that only one alternative from among the environmentally benign ones in the
18 agency’s power would accomplish the goals of the agency’s action”). “[A]n applicant
19 cannot define a project in order to preclude the existence of any alternative sites and thus
20 make what is practicable appear impracticable.” Sylvester v. U.S. Army Corps of Eng’rs,
21 882 F.2d 407, 409 (9th Cir. 1989). Although the Forest Service is permitted to take the
22 applicant’s purposes into consideration, it cannot draft a narrow purpose statement that
23 restricts the consideration of alternatives to one motivated by private interests. Nat’l Parks
24 & Conservation Ass’n, 606 F.3d at 1072.

25 161. Regarding the FEIS’ view of the “purpose and need” for its review of the
26 Exchange and Project, the Agency states that “the purpose and need for this project is
27 twofold: 1. To consider approval of a proposed mine plan governing surface disturbance on
28 NFS lands—outside of the exchange parcels—from mining operations that are reasonably

1 incident to extraction, transportation, and processing of copper and molybdenum. [and] 2.
2 To consider the effects of the exchange of lands between Resolution Copper (offering 5,460
3 acres of private land on eight parcels located throughout Arizona) and the United States
4 (2,422 acres forming the Oak Flat Federal Parcel) as directed by Section 3003 of PL 1113-
5 291 [the NDAA].” FEIS at ES-6.

6 162. The FEIS then states the Agency’s interpretation of the applicable law that it
7 believed governed its review of the Project:

8 The role of the Forest Service under its primary authorities in the Organic
9 Administration Act, Locatable Minerals Regulations (36 Code of Federal
10 Regulations (CFR) 228 Subpart A), and the Multiple-Use Mining Act is to
11 ensure that mining activities minimize adverse environmental effects on
12 NFS surface resources and comply with all applicable environmental laws.
13 The Forest Service may also impose reasonable conditions to protect
14 surface resources.

15 Through the Mining and Mineral Policy Act, Congress has stated that it is
16 the continuing policy of the Federal Government, on behalf of national
17 interests, to foster and encourage private enterprise in – the development of
18 economically sound and stable domestic mining, minerals, and metal and
19 mineral reclamation industries; and orderly and economic development of
20 domestic mineral resources, reserves, and reclamation of metals and
21 minerals to help ensure satisfaction of industrial, security, and
22 environmental needs.

23 Secretary of Agriculture regulations that govern use of surface resources in
24 conjunction with mining operations on NFS lands are set forth under 36
25 CFR 228 Subpart A.

26 FEIS ES-6.

27 163. As shown herein, the Agency’s view of its authority over the Project
28 misinterprets federal public land, mining, and environmental law. Throughout the multi-
year NEPA process, public involvement, and preparation of the EIS, the Forest Service was
under the mistaken belief that its review and approval of Resolution’s proposed uses of
federal land, and all of the proposed activities, are solely under the company’s GPO and the
Agency’s hardrock mining regulations at 36 C.F.R. Part 228A. *See* FEIS at 8.

1 164. In its “Purpose and Need” section, the FEIS never mentions, as it now
2 acknowledges in the Draft ROD, that all of the Project facilities on Forest Service managed
3 lands after the Exchange would be governed by the Agency’s 36 C.F.R. Part 251
4 regulations, not the Agency’s Part 228A mining regulations.

5 165. In addition, the Agency’s focus on the need to support mineral development
6 under the 1970 Mining and Mineral Policy Act is misplaced. First, that Act, which merely
7 notes general principles, creates no controlling statutory mandate on the Agency. Instead,
8 the Forest Service’s primary mandate is to protect the forest from destruction and
9 depredations under the 1897 Organic Act. The Agency’s guiding congressional mandate
10 regarding the national forests is “to regulate their occupancy and use and to preserve the
11 forests thereon from destruction.” 16 U.S.C. §551.

12 166. In addition, the FEIS never discusses the requirements for public review and
13 protection of public resources for special uses and rights-of-ways under FLPMA Title V, 43
14 U.S.C. §§1761-1771.

15 167. The Agency’s reliance on the Multiple-Use Mining Act of 1955 is also
16 legally invalid, as that law does not require that the Forest Service approve operations
17 related to mineral development, including mining of minerals on private lands, without the
18 required evidentiary support in the record to support any assertions of statutory rights
19 against the United States. Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 409
20 F.Supp.3d 738, 759 (D. Ariz. 2019).

21 168. Overall, the Agency’s legally incorrect view of the “purpose and need” for
22 its review of the Project fatally undermines the entire FEIS. “No amount of alternatives or
23 depth of discussion could ‘foster[] informed decision-making and informed public
24 participation’ when the Forest Service bases its choice of alternatives on an erroneous view
25 of the law. See Westlands Water Dist. v. U.S. Dep’t of Interior, 376 F.3d 853, 868 (9th Cir.
26 2004).” Ctr. for Biological Diversity, 409 F. Supp. 3d at 766.

27
28

1 169. If an Agency misconstrues its statutory and regulatory authority, it fails to
2 take “a hard look at all reasonable options before it,” and violates NEPA. N.M. ex rel
3 Richardson v. U.S. Bureau of Land Mgmt., 565 F.3d 683, 711 (10th Cir. 2009).

4
5 *Failure to Consider and Properly Review All Reasonable Alternatives, Including the No-*
6 *Action Alternative*

7 170. NEPA’s requirement that an agency provide an objective evaluation of a
8 range of reasonable alternatives to the proposed action “is the heart of the NEPA process.”
9 42 U.S.C. § 4332(C)(iii) & (E); 40 C.F.R. § 1502.14. This provides “a clear basis for
10 choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. Federal
11 agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,”
12 including “reasonable alternatives not within the jurisdiction of the lead agency.” Id.; *see*
13 *also id.* § 1502.14(c).

14 171. As the Ninth Circuit has held:

15 NEPA requires that federal agencies consider alternatives to recommended actions
16 whenever those actions “involve[] unresolved conflicts concerning alternative uses
17 of available resources.” 42 U.S.C. § 4332(2)(E) (1982). The goal of the statute is to
18 ensure “that federal agencies infuse in project planning a thorough consideration of
19 environmental values.” The consideration of alternatives requirement furthers that
20 goal by guaranteeing that agency decisionmakers “[have] before [them] and take []
21 into proper account all possible approaches to a particular project (including total
22 abandonment of the project) which would alter the environmental impact and the
23 cost-benefit balance.” NEPA’s requirement that alternatives be studied, developed,
24 and described both guides the substance of environmental decisionmaking and
25 provides evidence that the mandated decisionmaking process has actually taken
26 place. Informed and meaningful consideration of alternatives--including the no
27 action alternative--is thus an integral part of the statutory scheme.

28 Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988) (citations omitted).

 172. This includes a duty to fully review the No-Action Alternative. Id. The
requirement for the No-Action Alternative exists as a mechanism for comparing the
environmental and related social and economic effects of the affected environment in the
absence of the proposed action as compared to all of the proposed action alternatives.
“Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act

1 Regulations,” *Federal Register* Vol. 46, No. 55, March 1981, Question 3, “No Action
2 Alternative.”

3 173. The FEIS described its view of the No-Action Alternative:

4 The no action alternative includes the following:

5 • The final GPO would not be approved, thus, none of the activities in
6 the final GPO would be implemented, and the mineral deposit would not be
developed;

7 • The land exchange would not take place;

8 • Certain ongoing activities on Resolution Copper private land, such
9 as reclamation of the historic Magma Mine, exploration, monitoring of
10 historic mining facilities such as tailings under existing State programs and
11 permits, maintenance of existing shaft infrastructure, including dewatering,
and water treatment and piping of treated water along the MARRCO
corridor to farmers for beneficial use, would continue regardless of GPO
approval;

12 • Ongoing trends not related to the proposed project would continue,
13 such as population growth, ongoing impacts on air quality from fugitive
dust and vehicle emissions, human-caused fires from recreation, ranching,
14 and a corresponding increase in use of public lands; and

15 • No agency land and resource management plans would be amended
for this project.”

16 FEIS at 87-88.

17 174. Regarding the No-Action Alternative, the Agency states that: “The no action
18 alternative cannot be selected ... because the land exchange was mandated by Congress and
19 the Forest Service does not regulate mining operations on private land.” Draft ROD at 26.

20 175. Thus, under the Agency’s view, the No-Action Alternative cannot be
21 selected because Congress mandated the approval of the Exchange.

22 176. But that erroneously links the review and approval of the proposed uses on
23 the remaining federal lands with the approval of the Exchange. Nothing in the NDAA, or
24 any other federal law, requires the Forest Service (or any other agency such as the Corps of
25 Engineers) to approve anything beyond the Exchange (and that approval is subject to
26 significant constraints as noted herein).

27 177. A proper No-Action Alternative, then, must be focused on the company’s
28 proposed uses of federal land (and its related impacts to private and state lands) as if all of

1 the proposed uses on the remaining (non-exchanged) federal lands are denied by the Forest
2 Service or Army Corps of Engineers. Indeed, as detailed herein, when the Forest Service
3 reviews these proposed uses under the proper regulatory structure, the proposed uses cannot
4 be approved, due to irreparable and devastating impacts that would result from approval of
5 the uses.

6 178. Yet, as detailed herein, nothing in the NDAA or any other law requires the
7 agency to approve these uses. Overall, the agency cannot base its NEPA review, including
8 consideration of the No-Action Alternative, on an incorrect view of the law, or on any
9 presumption that it must approve the proposed uses.

10 179. A legitimate and proper No-Action Alternative must, then, consider the
11 conditions that will exist if the agencies deny the proposed uses of federal land. For
12 example, because Resolution would have no need to continue to pump and dewater
13 groundwater if it was denied its proposed uses (even after the Exchange was completed),
14 because it would not have the support facilities necessary to mine the ore body, the baseline
15 and related conditions that would then exist must be considered as the true No-Action
16 Alternative condition.

17 180. The Forest Service incorrectly believes that the dewatering will continue
18 (FEIS at 87-88) even if the proposed uses were not approved. *See also* FEIS at 394 (“Under
19 the no action alternative, which includes continued dewatering pumping of the deep
20 groundwater system...”). But the fact that Resolution would obtain the ore body and
21 surrounding lands via the Exchange does not mean that it would continue groundwater
22 pumping when it could not conduct the proposed uses on the remaining federal lands.
23 Indeed, the previous operator shut down the pumps for approximately ten years in or
24 around 1997.

25 181. The FEIS lists several major ongoing actions of Resolution Copper, which
26 the Forest Service improperly included as the environmental baseline, which results in
27 these impacts not being analyzed at any point in the NEPA process. This includes, but is not
28 limited to, the ongoing and “continued dewatering” of the mine shafts, including shafts No.

1 9 and No. 10, among other shafts and tunnels. Other actions and impacts that have been
2 ignored by the Forest Service in the FEIS include “reclamation of the historic Magma
3 Mine; exploration; monitoring of historic mining facilities such as tailings under existing
4 State programs and permits; maintenance of existing shaft infrastructure, including
5 dewatering; and water treatment and piping of treated water along the MARRCO corridor
6 to farmers for beneficial use.” FEIS at 87-88. Regarding this last point, the FEIS unfairly
7 considers Resolution Copper’s water recharge efforts, which include delivery of dewatered
8 water to New Magma Irrigation and Drainage District, as an applicant-committed
9 environmental protection measure while failing to analyze the actual environmental impacts
10 of that same dewatering that would occur at the Mine and throughout the well corridor.

11 182. In addition, the FEIS fails to consider the reasonable alternative where the
12 land exchange takes place per the NDAA, but the Agency denies some or all of the Special
13 Use Permits for the tailings pipeline and electrical facilities, and/or the Special Use Permit
14 that should have been required for the ore concentrate pipeline and construction laydown
15 yard in and near the MARRCO corridor.

16 183. The Agency refused to consider this reasonable alternative because it
17 erroneously believed that “the Forest Service is unable to refuse approval of the GPO
18 within their regulations and guidance.” FEIS at 88. But this is internally contradicted by
19 the FEIS and Draft ROD, where the Agency says that since it does not have discretion to
20 deny the Exchange, all Project facilities on Forest Service managed lands should be
21 regulated under Special Use Permits, not the GPO. And the Forest Service **does** have the
22 authority and discretion to deny Special Use Permit applications under FLPMA and the
23 Agency’s 36 C.F.R. Part 251 and Part 261 regulations.

24 184. Indeed, as shown herein, and by the massive destruction to Oak Flat and the
25 surrounding lands and waters that would be made possible by the issuance of the Special
26 Use Permits (i.e., if these Permits are not issued, then the Mine Project could not occur
27 regardless of whether the Exchange takes place), this alternative is the only legally-
28 defensible choice for the Agency, and yet it was not even considered.

1 *Failure to Adequately Consider All Direct, Indirect, and Cumulative Impacts, and*
2 *Connected Actions*

3 185. The FEIS fails to adequately analyze the direct, indirect, and cumulative
4 impacts from the Exchange and Project on all potentially affected resources, including air
5 quality, water quality and quantity, wildlife, cultural/religious resources, recreation, and
6 economics.

7 *Water Resources and Mine Water Use*

8 186. One of the most glaring inadequacies in the FEIS involves water. In the
9 company's General Plan of Operations, Resolution Copper provides a number for its total
10 water needs for the life of the mine. Resolution states, "[a] current estimate of the total
11 quantity of water needed for the life of the mine is 500,000 ac-ft." GPO, Volume 1, Sec.
12 3.6.1, Water Balance, Sources, and Management at 174.

13 187. However, the FEIS estimates that the total quantity of external water needed
14 for the life of the mine (construction through closure and reclamation) could be as much as
15 590,000 AF. FEIS at ES-25. The Forest Service notes this water use amount is in addition
16 to the approximate 87,000 AF of water that would be dewatered over the life of the Mine to
17 keep its tunnels, adits, shafts and other underground infrastructure free of water so that
18 mining can occur. FEIS at 405. This water would be consumed in Mine operations.

19 188. When combined, these two actions of the Project would consume (deplete)
20 677,000 AF of water from Arizona's limited water sources over the life of the Mine.

21 189. An analysis of the Tables and Figures contained in Resolution's GPO shows
22 that Resolution's total water usage over the life of the Mine may be even greater—closer to
23 786,626 AF. *See* GPO Figures 3.6-1a, 3.6-1b, and 3.6-1c (Volume 2).

24 190. The FEIS did not address the clear disconnect between Resolution's own
25 water usage figures contained in the GPO (totaling up to 786,626 AF) and the numbers
26 ultimately analyzed by the Forest Service in the FEIS.

27 191. The FEIS admits that at least 550,000 AF of "fresh groundwater" would be
28 pumped by Resolution Copper at the Desert Wellfield (the area in the East Salt River

1 Valley where Resolution will pump the vast majority of the groundwater to support the
2 Mine). FEIS at H-7.

3 192. The FEIS fails to provide any meaningful analysis demonstrating that the
4 pumping impacts associated with the Desert Wellfield would be fully mitigated and
5 compensated by Resolution. The Forest Service states that “the entire amount of makeup
6 water needed for the mine was assumed to be physically pumped from the Desert
7 Wellfield.” FEIS at 969.

8 193. Yet the Forest Service failed to analyze and detail how, and where, all this
9 mitigation water will come from. Instead, the FEIS relies on future Arizona state water
10 permitting processes to ascertain these critical water issues.

11 194. Although the Arizona Department of Water Resources (“ADWR”) has been
12 a cooperating agency in the NEPA process, the FEIS fails to adequately analyze the physical
13 availability of Arizona’s water resources to be consumed by the Mine—or the direct,
14 indirect, and cumulative impacts that the consumption of such a large volume of water
15 (677,000 AF – 786,626 AF) would have on Arizona’s water supplies on a local, regional, or
16 state-wide basis.

17 195. The FEIS admits that the actual water use by the Project would be
18 determined by ADWR in the future, long after the NEPA and NDAA review has been
19 completed. This includes a determination of the “unavoidable impacts” and related
20 mitigation measures associated with the massive dewatering of the East Salt River valley
21 stemming from Resolution Copper’s Desert Wellfield. FEIS at 422.

22 196. Yet the extent of these “unavoidable impacts” must be determined, analyzed,
23 and subject to full public review during the NEPA process—not during some future state
24 process to which NEPA and the NDAA do not apply.

25 197. A determination of all the sources of water, including the availability of the
26 water supply, as well as the location, rate of pumping, and the governing legal authorities
27 should have been made and included in the FEIS for full analysis of baseline conditions, and
28 the Project’s direct, indirect, and cumulative impacts, as well as mitigation.

1 198. Although the Forest Service cannot rely on future state permitting
2 procedures and reviews to satisfy its NEPA and NDAA analysis requirements (as all
3 analysis needed to be completed in the FEIS), even under state law, the Agency has not
4 demonstrated that the Project would fully mitigate the Project’s water depletions.

5 199. Under the Arizona Groundwater Management Act of 1980, areas of the state
6 with “heavy reliance on mined groundwater” were designated as Active Management Areas
7 (“AMAs”), and for many AMAs including the Phoenix AMA, the primary management
8 goal is to achieve safe-yield by the year 2025.

9 200. The Mine and much of its infrastructure, including mine dewatering
10 infrastructure, “lies almost entirely within the Phoenix AMA.” FEIS at 387, n.52. The
11 Desert Wellfield is located within the East Salt River valley of the Phoenix AMA (FEIS at
12 416), although the Wellfield is in extremely close proximity to the Pinal AMA, and thus the
13 substantial pumping that would occur at the Desert Wellfield will intersect and deplete
14 groundwater supplies within the Pinal AMA as well.

15 201. The Forest Service acknowledges in the FEIS that “ultimately, the mine
16 water supply for each alternative can be reduced to the need for **fresh groundwater** to be
17 pumped or recovered from the Desert Wellfield...”, FEIS, Appendix H at H-7) (emphasis
18 added); *see also* FEIS at 385 (“makeup water supply for the mine would come from a series
19 of wells installed within the MARRCO corridor, drawing water from the deep alluvial units
20 of the East Salt River valley.”). The FEIS states this will be at least 544,858 AF, *see, e.g.*,
21 FEIS at 414, Figure 3.7.1-7, which is over **177 billion** gallons of water.

22 202. The FEIS at ES-24 vaguely concludes that the numerous high-capacity wells
23 to be developed at the Desert Wellfield pumping in the East Salt River Valley along the
24 MARRCO corridor “would incrementally contribute to the lowering of groundwater levels
25 and cumulatively reduce overall groundwater availability in the area.” But the FEIS fails to
26 provide substantive details about these impacts or to meaningfully or objectively consider
27 the direct, indirect, or cumulative impacts of the Desert Wellfield pumping to the
28

1 groundwater availability in the area or to local, regional, or state-wide water supplies and
2 the environment overall.

3 203. For example, the Forest Service failed to adequately consider or analyze in
4 the FEIS the direct, indirect and cumulative impacts of the large amount of water to be
5 pumped by the Desert Wellfield on the important safe-yield goals of the Phoenix AMA or
6 the Pinal AMA, which should have, in particular, considered the impacts of the massive
7 amount of “fresh groundwater” to be withdrawn from the Desert Wellfield—which will be
8 544,858 AF under the preferred alternative (the Forest Service sometimes rounds this
9 number up to 550,000 in the FEIS).

10 204. The Forest Service failed to adequately consider or analyze in the FEIS the
11 direct, indirect or cumulative impacts on groundwater dependent ecosystems and other
12 resources resulting from the large amount of groundwater to be pumped from the Desert
13 Wellfield, summarily concluding (without any material analysis, surveys or other empirical
14 information) that due to “depths to groundwater” there “are no [groundwater dependent
15 ecosystems] in the East Salt River valley supported by regional groundwater that
16 potentially could be impacted by drawdown from the mine water supply pumping.” FEIS at
17 385. This is far from the detailed “hard look” required by NEPA.

18 205. The Agency states that “the amount of groundwater in storage in the East Salt
19 River valley subbasin (above a depth of 1,000 feet) is estimated to be about 8.1 million
20 acre-feet.” FEIS at 415. The Forest Service provides no basis in the FEIS for this critical
21 assumption and it relies on this unsubstantiated assumption throughout the FEIS.

22 206. The Forest Service also fails to make clear: (1) if the 8.1 million AF of
23 groundwater “in storage” it relies upon is in reference to CAP water or other water sources
24 that have been banked or stored in underground storage facilities in the East Salt River
25 valley; (2) if this is in reference to the total amount of natural groundwater in the entire East
26 Salt River valley subbasin; and (3) how much of the 8.1 million AF of groundwater “in
27 storage” is already being utilized or will be utilized by others now or in the future.

28

1 207. In fact, the Forest Service notes in the cumulative effects analysis that
2 “Approximately 7 million acre-feet of long-term storage credits were stored in the entire
3 Phoenix AMA at the end of 2017 (Barter et al. 2020).” FEIS at 971.

4 208. Yet, the FEIS does not distinguish these storage credits from the 8.1 million
5 figure, injecting significant uncertainty into the Forest Service’s evaluation of the impacts
6 of Resolution’s pumping on total stored water available.

7 209. The Forest Service also never confirms in the FEIS where this 8.1 million
8 AF estimate comes from, whether it has been independently verified by the Agency, or
9 what the range of uncertainty is associated with this estimate. This falls far short of the
10 basic requirement for a “hard look” under NEPA.

11 210. The FEIS inadequately analyzes the cumulative impacts of the Desert
12 Wellfield pumping and Mine dewatering on regional and local water supplies—supplies
13 that are already being stretched to their limit by drought and existing pumping, with more
14 groundwater demand anticipated in the coming years as discussed herein.

15 211. Under NEPA, the Agency must provide the needed information in the Draft
16 and Final EIS and this duty is not excused by a vague allusion to “uncertainties” or because
17 either the Agency or the Project proponent has yet to obtain/compile the needed
18 information.

19 212. Thus, the Forest Service failed to provide the required information and
20 analysis on baseline conditions and water impacts as noted herein, and failed to provide the
21 specific justification why this failure is acceptable under NEPA:

22 When an agency is evaluating reasonably foreseeable significant adverse
23 effects on the human environment in an environmental impact statement
24 and there is incomplete or unavailable information, the agency shall always
25 make clear that such information is lacking.

26 (a) If the incomplete information relevant to reasonably foreseeable
27 significant adverse impacts is essential to a reasoned choice among
28 alternatives and the overall costs of obtaining it are not exorbitant, the
agency shall include the information in the environmental impact statement.

1 40 CFR § 1502.22. “If there is ‘essential’ information at the plan-or site-specific
2 development and production stage, [the agency] will be required to perform the analysis
3 under § 1502.22(b).” Native Village of Point Hope v. Jewell, 740 F.3d 489, 499 (9th Cir.
4 2014).

5 213. The Forest Service cannot credibly assert that the need to fully understand
6 the direct, indirect and cumulative water impacts of this Project, which could be
7 catastrophic for regional and local water users (and the Phoenix AMA’s and Pinal AMA’s
8 goal of safe-yield) is not essential to its review of the Project under NEPA.

9 214. This includes the obligation to document and verify, among other things: (1)
10 the total amount of water that is physically available for pumping at the Desert Wellfield –
11 beyond an unverified suggestion that there is 8.1 million AF of water in “storage”; (2) the
12 location and size of existing local and regional groundwater wells that might be adversely
13 impacted (and even rendered dry) by the Mine’s pumping and water use; and (3) the
14 reasonably foreseeable planned developments in the area, such as the large Superstition
15 Vista development, among other planned developments.

16 215. The Forest Service thus failed to consider the baseline conditions of these
17 above-described areas as well as the direct, indirect, and cumulative impacts of the Mine’s
18 projected water use relative to this information and potential mitigation for these impacts.

19 216. The Forest Service is required to fully review, verify, and understand any
20 scientific models used in the FEIS. This includes any groundwater flow models used to
21 examine the direct, indirect, and cumulative impacts of the massive groundwater pumping
22 and mine dewatering requirements of the Mine.

23 217. The FEIS, at 378, states (though does not explain) that the groundwater flow
24 model used to predict pumping impacts from the Desert Wellfield was developed by
25 Resolution Copper “from an existing, calibrated, regulatory model prepared by ADWR...”.
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27
28

1 218. The record reveals that the Resolution Copper relied upon the 2009 ADWR
2 Salt River Valley flow model as the basis of their groundwater model for the Desert
3 Wellfield.⁴

4 219. However, the FEIS fails to provide any information that would assist the
5 public to independently review the accuracy of the Resolution Copper model that was,
6 presumably, built from the ADWR model.

7 220. The Forest Service acknowledges in response to public comments that it did
8 not independently review the model:

9 These comments indicate that **the separate groundwater model used to**
10 **predict impacts from the Desert Wellfield was not scrutinized or vetted**
11 **by the NEPA team, as was the mine-site groundwater model.** This is a
12 correct statement. Because the model used for the Desert Wellfield is a
standard regulatory model prepared and used by the Arizona Department of
Water Resources, the same level of evaluation was not deemed necessary.

13 FEIS at Appendix R at R380 (emphasis added).

14 221. Resolution Copper's revisions to the ADWR model were evaluated by BGC
15 Engineering USA, Inc., in its report entitled "Project Memorandum re: Review of the
16 ADWR Salt River Valley Groundwater Model Application for Resolution's Desert
17 Wellfield – FINAL," dated August 3, 2020 (Walser 2020). Walser 2020 is included in the
18 Project record.

19 222. The evaluation by Walser pointed out numerous material concerns with the
20 Resolution Copper model that undermine its reliability.

21 223. Walser notes that the ADWR model utilized by Resolution Copper to
22 analyze the impacts of pumping from the Desert Wellfield "was last updated in 2009."
23 Walser at 4. But, Walser also notes that in 2010 a "refined geology framework was
24 developed for the model area (ADWR, 2010b), however, this framework has not been
25 incorporated in the [Resolution Copper] numerical model." *Id.*

26
27
28 ⁴ See Garrett, C. 2018a. *ADWR/Desert Wellfield Modeling Meeting*. Phoenix, Arizona:
SWCA Environmental Consultants. November 9, 2018 ("2018 Modeling Meeting
minutes"). <https://www.resolutionmineeis.us/documents/garrett-swca-adwr-meeting-2018>

1 224. In addition, in 2014, ADWR completed a major update to its East Salt River
2 Valley portion of the Salt River Valley model to perform key “structural modifications”
3 related to the simulated thickness of aquifer materials and other matters. These important
4 structural improvements were also not included in the Resolution Copper model.⁵

5 225. Thus, the Forest Service relied on groundwater modeling in the FEIS that
6 was based on an earlier version of the ADWR Salt River Valley that did not have the
7 benefit of ADWR’s 2014 updates to correct structural problems. The FEIS does not
8 explain why the updated model was not used, nor does it explain why the structural
9 problems in the 2009 model can be ignored.

10 226. The Forest Service has an independent obligation under NEPA and the
11 NDAA to objectively review, independently verify, and understand the groundwater flow
12 model used by Resolution Copper, regardless of whether it represented a modification of an
13 existing ADWR planning model. The Forest Service failed to perform its independent
14 obligations relative to the Resolution Copper groundwater flow model for the Desert
15 Wellfield in violation of NEPA.

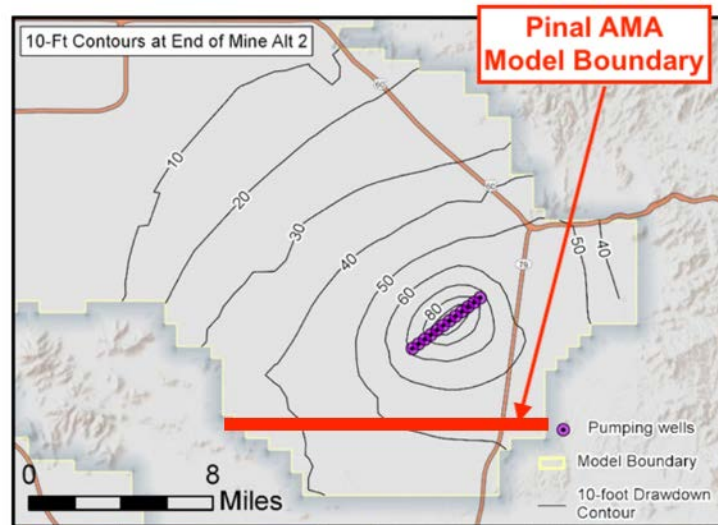
16 227. The Desert Wellfield sits at the boundary of the Phoenix and Pinal AMAs,
17 yet despite the Desert Wellfield’s extremely close proximity to the Pinal AMA and the
18 obvious pumping impacts from the Desert Wellfield to groundwater levels in the Pinal
19 AMA, the Resolution Copper groundwater model entirely excludes impacts to groundwater
20 resources in the Pinal AMA, and instead abruptly terminates at the boundaries of the
21 Phoenix AMA without explanation, despite the hydrologic connection between the two
22 AMAs as shown in the FEIS at 368, Figure 3.7.1-2.

23 228. The Forest Service ignores this critical failing in its NEPA analysis, despite
24 the fact that the drawdown contours from pumping the Desert Wellfield are shown in the
25

26
27 ⁵ See November 9, 2018, Montgomery & Associates Power Point Presentation, attached to
28 the 2018 Modeling Meeting minutes (“Nov. 2018 Power Point”) at slide 5 (“Utilize 2009
ADWR SRV model that simulates groundwater flow from 1983 through 2006 (Freihoefer
et. al., 2009).”).

1 FEIS to extend down past the southernmost boundary of this model by levels of at least 40
2 feet or more and into the Pinal AMA model boundary.

3 229. Figure 3.7.1-2 from the FEIS, which depicts projected groundwater impacts
4 from Desert Wellfield pumping, has been modified below to illustrate the location of the



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13 Pinal AMA boundary.

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15 230. As a result, the Forest Service did not identify or consider the direct, indirect
16 and cumulative impacts from the pumping at the Desert Wellfield to groundwater levels or
17 wells within the Pinal AMA, meaning that the FEIS fails to disclose potentially catastrophic
18 impacts from the Desert Wellfield pumping to groundwater resources within the Pinal
19 AMA.

20 231. Regarding why this was not considered, the Forest Service says (FEIS at R-
21 342) that the "area for which this model was conducted does not extend as far north as the
22 Desert Wellfield, or as far any substantial drawdown anticipated from the Desert
23 Wellfield." Given what the Forest Service's own figure above shows, that is not true.

24 232. The Pinal AMA groundwater flow model was updated by ADWR in
25 October 2019.⁶

26 233. Among other things, the ADWR updates show a **shortfall** of 8 million acre-
27 feet of water between demands and available groundwater resources in the Pinal AMA.

28
⁶ See <http://infoshare.azwater.gov/docushare/dsweb/View/Collection-19686>

1 This shortfall was not meaningfully evaluated by the Forest Service in the FEIS as NEPA
2 requires.⁷

3 234. In fact, “Modifications in the 2019 Pinal Model domain were concentrated in
4 the northeast corner of the model where it overlaps with the SRV [Salt River Valley]
5 model...”⁸

6 235. Given the rampant shortcomings in Resolution Copper’s groundwater
7 modeling efforts for the Desert Wellfield, the Forest Service was required to perform an
8 objective and independent analysis of the baseline conditions and of the direct, indirect, and
9 cumulative impacts of pumping from the Desert Wellfield using the most recent modeling
10 available, including the new and updated 2019 Pinal Model.

11 236. The results of the Resolution Copper model relied upon by the Forest
12 Service in the FEIS are fundamentally flawed, likely grossly underestimate the decline in
13 regional groundwater supplies in the East Salt River Valley that would be caused by the
14 Desert Wellfield, and cannot be used by the Agency to examine the direct, indirect or
15 cumulative impacts from the Desert Wellfield pumping on individual wells in the area, or
16 the local or regional water supply in the East Salt River Valley under NEPA.

17
18 **Additional Flaws in the Direct, Indirect, and Cumulative Effects Analysis**

19 237. The Forest Service’s cumulative effects analysis also fails to adequately
20 consider a number of reasonably foreseeable activities in the East Salt River Valley. These
21 include the Superstition Vistas mega residential development, other developments planned
22 near Florence, and the planned development of numerous new agricultural production

23 _____
24 ⁷ See *id.*; see also ADWR, 2019 Pinal Model And 100-Year Assured Water Supply
25 Projection Technical Memorandum (Oct. 11, 2019), available at:
26 [http://infoshare.azwater.gov/docushare/dsweb/Get/Document-
11793/2019_Pinal_Model_and_100-Year_AWS_Projection-Technical_Memorandum.pdf](http://infoshare.azwater.gov/docushare/dsweb/Get/Document-11793/2019_Pinal_Model_and_100-Year_AWS_Projection-Technical_Memorandum.pdf)

27 ⁸ Technical Memorandum, Appendix B, p. B-4 available at:
28 [http://infoshare.azwater.gov/docushare/dsweb/Get/Document-
11795/Appendix_B_Structural_Modifications_to_the_Pinal_Model.pdf](http://infoshare.azwater.gov/docushare/dsweb/Get/Document-11795/Appendix_B_Structural_Modifications_to_the_Pinal_Model.pdf).

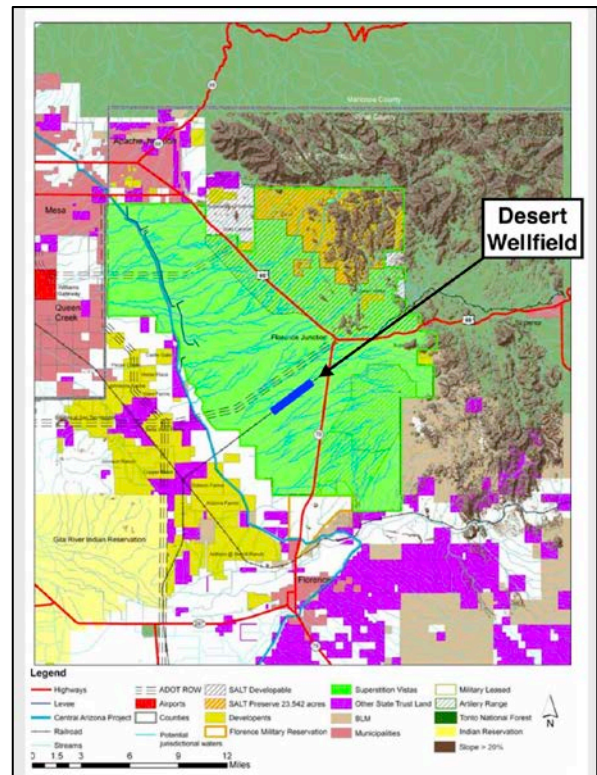
1 (groundwater) wells that will soon be developed due to impending shortages on the
2 Colorado River, among other things.

3 238. For example, despite the existence of concrete plans for the 275-square mile
4 Superstition Vistas mega development, located within the Project's analysis and impacts
5 area, the Forest Service declined to consider the development as a reasonable foreseeable
6 action under NEPA, observing (incorrectly, as discussed below) that plans for Superstition
7 Vistas were "conceptual and lack adequate detail to allow substantial analysis of resource
8 effects..." FEIS at 966, and that "no concrete steps have been taken for the auction of this
9 land by the ASLD." FEIS at 971.

10 239. The Forest Service acknowledged the planned Superstition Vistas
11 development in the FEIS, at 966, and at
12 other places in its cumulative effects
13 analysis, despite concluding it is not a
14 reasonably foreseeable future activity. But
15 the Forest Service does not consider or
16 meaningfully analyze the cumulative water
17 impacts of the development on local or
18 regional water supplies as required by
19 NEPA.

20 240. The Forest Service violated
21 NEPA and the NDAA when it failed to
22 fully evaluate the planned Superstition
23 Vistas mega development and its substantial
24 water needs as a reasonably foreseeable future action.

25 241. As early as 2006, the Arizona State University Morrison Institute for Public
26 Policy issued a study on the Superstition Vistas development ("The Treasure of the
27 Superstition Vistas").⁹



⁹ https://morrisoninstitute.asu.edu/sites/default/files/treasure_superstition_vistas.pdf.

1 242. Per this report, the 275-square mile planned Superstition Vistas development
2 would cover an area larger than the cities of Mesa, Tempe, Chandler, and Gilbert combined
3 (p.9). The development is anticipated to have a population at build out of nearly 1 million
4 people (p.13), and would have a minimum water demand of 190,000 AF per year (p.15).

5 243. The Desert Wellfield pumping area for the Resolution Project sits at the
6 heart of the 275-square mile Superstition Vistas land (shown in green). This can be seen in
7 the illustration included above.

8 244. The need for the Forest Service to consider the cumulative impacts to water
9 stemming from the Desert Wellfield pumping along-side water demands for the massive
10 Superstition Vistas development has been raised numerous times to the Agency, both in
11 comments by others, including the Arizona State Land Department (“ASLD”) (FEIS,
12 Appendix R-43)(the ASLD recently auctioned-off lands paving the way for this
13 development), as well in Plaintiffs’ comments on the DEIS.

14 245. The Forest Service erroneously concluded that Superstition Vistas is entirely
15 “speculative” and never considered its impacts in the FEIS, believing that the Arizona State
16 Land Department had not taken **any** “concrete steps” to auction the lands needed for the
17 Superstition Vistas development. FEIS at 971.

18 246. Yet, to the contrary, documents Plaintiffs provided to the Forest Service
19 detail the progress and advancement of the Superstition Vistas development, including the
20 fact that the Arizona State Land Department just recently auctioned 2,700 acres of State
21 Trust Lands for this very development. *See* Phase I Environmental Site Assessment ASLD
22 Auction Site prepared by Geotek (October 2019); *see also* “Homebuilders run up price of
23 East Valley land to \$245.5M in controversial state auction” (AZCentral, Nov. 5, 2020).
24 Thus, plans for the sale and development of additional acres are already underway. *Id.*

25 247. Superstition Vistas has also been anticipated and considered by the Arizona
26 Department of Water Resources in its water models and reports related to this region, and it
27 is considered in other planning documents maintained by Pinal County and numerous local
28 cities and towns. *See* ADWR Pinal Water Model (2019); Pinal County Comprehensive Plan

1 (2019) & Resolution No. 2020-PZ-PA-004-20 by Pinal County Board of Supervisors
2 Approving Amendment Recorded November 19, 2020.

3 248. Indeed, the Arizona State Land Department criticized the Forest Service's
4 Draft EIS for the adverse impacts from Resolution's dewatering on the plans on the
5 Superstition Vistas development.

6 249. The Arizona State Land Department filed extensive comments on the DEIS,
7 warning of the significant impacts from Resolution's Desert Wellfield pumping and
8 dewatering on the plans for the Superstition Vistas development, and correspondingly, on
9 the Arizona State Trust that is administered by the Arizona State Land Department under
10 the Arizona Enabling Act. The State stated: "The greatest potential adverse impact to the
11 [Arizona] Trust will be the water (usage of approximately 600,000 acre-feet (AF) over the
12 LOM [Life of Mine]) that will be extracted from the aquifer beneath the Superstitions
13 Vistas Planning Area (SVPA)." FEIS, Appendix R at R-43.

14 250. The Arizona State Land Department also observed that, "[b]ased upon the
15 anticipated groundwater requirements contained in the DEIS, the negative impact of the
16 proposed water consumption sourced from the Superstition Vistas Planning Area (SVPA)
17 far outweighs the estimated financial benefits to the Trust resulting from other aspects of
18 the project by a factor of 20:1." Id. at R-44. The Arizona State Land Department further
19 stated that "...the extraction and transportation of groundwater out of the SVPA
20 [Superstition Vistas Planning Area] greatly compromises the ability to develop these lands
21 to their full planned potential, and as a result, reduces the income and value of the Trust."
22 Id.

23 251. The Forest Service specifically acknowledged the "anticipated development
24 in the Superstitions Vistas planning area." DEIS 342.

25 252. Under NEPA, the Agency cannot simply ignore cumulative impacts by
26 labeling them as "speculative," especially when planning for these activities is already
27 underway, concrete steps have been taken to facilitate the action, and the action is
28 considered in numerous plans by state and local communities. "[P]rojects need not be

1 finalized before they are reasonably foreseeable. ‘NEPA requires that an EIS engage in
2 reasonable forecasting. Because speculation is . . . implicit in NEPA, []we must reject any
3 attempt by agencies to shirk their responsibilities under NEPA by labeling any and all
4 discussion of future environmental effects as crystal ball inquiry.’” N. Plains Res. Council,
5 Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1078-79 (9th Cir. 2011) (citations omitted).

6 253. The Forest Service’s decision to ignore this reasonably foreseeable, indeed
7 planned, activity violates NEPA and the NDAA.

8 254. Water demands for the Superstition Vista development, discussed for well
9 over a decade, have been estimated to be between 100 and 156 gallons per capita per day.¹⁰

10 255. The 100 gallons per capita per day estimate reflects a highly aspirational
11 water conservation goal, as the actual water usage may be much higher. Using an average
12 of the current per-capita water usage figures available from ADWR for the towns of Mesa,
13 Gilbert, Chandler and Tempe (approximately 187 gallons per capita per day) shows that
14 Superstition Vistas development is likely to use approximately 210,000 AF of water per
15 year for its an anticipated population of 1 million people (Phoenix AMA Draft 4th
16 Management Plan, January 2020, p. Municipal 5-44).

17 256. Yet none of the water uses or other impacts associated with the Superstition
18 Vistas development were considered under NEPA by the Forest Service, in violation of
19 NEPA and the NDAA.

20 257. In contrast to the Forest Service’s unsupported claims that the already
21 planned Superstition Vistas development is “speculative,” and thus need not be considered,
22 the Agency nevertheless relies on Resolution’s hoped-for plans to acquire the state lands at
23 Skunk Camp as the entire basis for its preferred Alternative 6 pipeline and tailings waste
24 approvals.

25 258. The vast majority of the Skunk Camp area is not owned by Resolution
26 Copper but is instead Arizona State Trust Land that is owned by Arizona and administered

27 ¹⁰ See [Morrison Institute Report “The Treasure of the Superstitions”](#) (April 2006); see also
28 “Snider: New development will bring water concerns” (inMaricopa.com, Dec. 3, 2011).

1 by the Arizona State Land Department under the Arizona-New Mexico Enabling Act of
2 1910 and requirements of Arizona law. The Forest Service explains that “this alternative is
3 unique in that the tailings storage facility would be located on private lands (after eventual
4 acquisition of Arizona State Trust land).” FEIS at 19; *see also* FEIS at 24, Table 1.5.5-1.

5 259. Similarly, the southeastern portion of the area at the East Plant Site is also
6 not owned by Resolution Copper, but rather is State Trust Lands administered by the
7 Arizona State Land Department. FEIS at ES-22, Figure ES-7 (showing the southeastern
8 portion of the subsidence zone encroaching on State Trust Lands).

9 260. The Forest Service’s preferred alternative for Skunk Camp (upon which the
10 entire FEIS and Draft ROD is premised) and its plans for the development of the East Plant
11 Site are thus “speculative,” under the Agency’s view, as these plans are based on the
12 marginal possibility of multiple approvals from the Arizona State Land Department that
13 may or may not occur in the future.

14 261. Resolution Copper may never have a right to deposit its tailings at Skunk
15 Camp or take, by means of subsidence, State Trust Lands at the East Plant Site, since prior
16 to doing this, Resolution Copper would have to submit a formal application for the
17 acquisition of these lands, meet the Arizona State Land Department’s strict screening
18 process, and ultimately outbid any other interested party to acquire these lands at a
19 competitive, public auction.

20 262. The FEIS does not disclose that Resolution has performed any concrete steps
21 towards the acquisition of these State Trust Lands and there are no public plans disclosed
22 for the competitive auction of these lands as required by Arizona law.

23 263. To acquire these lands in private ownership, Resolution Copper would first
24 have to demonstrate that its acquisition of the Trust Lands would provide value to the Trust
25 and meet all Arizona State Land Department application requirements before the Trust
26 lands could go to public auction, which includes a careful review by Arizona State Land
27 Department of any factors associated with the potential auction of lands, including an
28 analysis of income potential to the Trust; proposed use; impact to adjacent Trust lands;

1 availability of utilities/infrastructure; access; proximity to existing development; parcel
2 size; and conformance with local jurisdiction regulations.

3 264. However, the Arizona State Land Department has already expressed
4 substantial concerns about the Mine, including specifically with regard to the Skunk Camp
5 tailings site vis-à-vis impacts to the Trust: “The [Skunk Camp] location is predominately
6 State Trust land, and it is highly likely that this location will adversely impact the Trust.”
7 FEIS at R-42. Further, based upon its concern about the potential water demand of the
8 Mine, particularly from Desert Wellfield pumping, the Arizona State Land Department has
9 already concluded **that the negative impact of the proposed water consumption for the**
10 **mine “outweighs the estimated financial benefits to the Trust resulting from other**
11 **aspects of the project by a factor of 20:1.”** *Id.* at R-44 (emphasis added).

12 265. Throughout the NEPA process, the Forest Service has repeatedly dismissed
13 various potential impacts to the environment from the Exchange and Mine as remote or
14 speculative. *See, e.g.*, FEIS at 424 (dismissing the formation of subsidence pit lakes as
15 remote and speculative); *Id.* at R-177 (dismissing concerns over the block-caving operation
16 as speculative); *Id.* at R-184 (dismissing concerns about greenhouse gas emissions from the
17 routes of travel and processing location for the copper concentrate as speculative); R-243
18 (dismissing concerns about Resolution Copper’s potential to develop its mineral claims
19 adjacent to the Mine as speculative and therefore, not reasonably foreseeable).

20 266. As detailed above, the Forest Service erroneously dismisses as “speculative”
21 the long-planned Superstition Vistas development, concluding that the Arizona State Land
22 Department has not taken any “concrete steps” to auction the lands needed for the
23 Superstition Vistas development, FEIS at 971, though, in fact, ASLD has already auctioned
24 off over 2,700 acres of State Trust lands for this very purpose.

25 267. Yet, with regard to the Skunk Camp site and the subsidence area at the East
26 Plant Site (both of which are owned and administered by the Arizona State Land
27 Department under Arizona law), the Forest Service assumes these truly speculative actions
28 are a given, without the required support, and completely fails to disclose or analyze in the

1 FEIS the speculative nature of its preferred alternative and the significant hurdles and
2 numerous future actions that are needed for Resolution’s potential acquisition of the state
3 lands at Skunk Camp for tailings purposes. This violates NEPA and the NDAA.

4 268. The FEIS also failed to consider and fully analyze as “reasonably
5 foreseeable activities” under NEPA the cumulative impacts from several other planned and
6 reasonably foreseeable housing developments in/near the nearby Town of Florence. These
7 developments, although well documented, were also dismissed from analysis under the
8 FEIS. FEIS at 966.

9 269. Several of those housing developments are under construction and sale right
10 now, and some units have already been completed and sold: Anthem Parkside at Merrill
11 Ranch by D.H. Horton ([https://www.drhorton.com/arizona/phoenix/florence/anthem-](https://www.drhorton.com/arizona/phoenix/florence/anthem-merrill-ranch)
12 [merrill-ranch](https://www.drhorton.com/arizona/phoenix/florence/anthem-merrill-ranch)); Parkside at Anthem at Merrill Ranch by Pulte Homes
13 ([https://www.pulte.com/homes/arizona/phoenix/florence/parkside-at-anthem-at-merrill-](https://www.pulte.com/homes/arizona/phoenix/florence/parkside-at-anthem-at-merrill-ranch-7739)
14 [ranch-7739](https://www.pulte.com/homes/arizona/phoenix/florence/parkside-at-anthem-at-merrill-ranch-7739)); Sun City Anthem at Merrill Ranch by Del Webb
15 ([https://www.delwebb.com/homes/arizona/phoenix/florence/sun-city-anthem-at-merrill-](https://www.delwebb.com/homes/arizona/phoenix/florence/sun-city-anthem-at-merrill-ranch-11846)
16 [ranch-11846](https://www.delwebb.com/homes/arizona/phoenix/florence/sun-city-anthem-at-merrill-ranch-11846)); and Crestfield Manor by D.H. Horton
17 (<https://www.buzzbuzzhome.com/us/crestfield-manor1>).

18 270. In addition, regarding overall demands and usage of water in the area,
19 although the Forest Service mentioned Arizona’s Drought Contingency Plan and the
20 impending “shortages” on the Colorado River in its cumulative effects analysis section of
21 the FEIS, *see, e.g.*, FEIS at 966, 967-69, the Forest Service declined to consider as
22 reasonably foreseeable activities the plans of farmers in the East Salt River Valley to
23 develop new pumping infrastructure in Pinal County under the Drought Contingency Plan
24 and before 2026 to facilitate the extraction of up to 70,000 AF of groundwater to replace
25 water supplies lost through Drought Contingency Plan agreements and the future cutbacks
26 in CAP water deliveries from the Colorado River. *Id.*

27
28

1 271. The Natural Resource Conservation Service has already committed \$10
2 million dollars to support the development of this new pumping infrastructure.¹¹

3 272. This new infrastructure will be located within the East Salt River Valley in
4 Pinal County.

5 273. The pumping infrastructure and its potential drawdown squarely falls within
6 the area impacted by Resolution’s Desert Wellfield pumping.

7 274. The Forest Service declined to consider Drought Contingency Plan activities,
8 such as the Pinal County pumping described above, concluding that because the State’s
9 Drought Contingency Plan guidelines extend only until 2026, the pumping by Pinal County
10 farmers will also conclude in 2026, and thus, this activity “will expire before Resolution
11 Copper begins pumping groundwater.” FEIS at 968. That is wrong, and completely
12 misunderstands the facts of Arizona water needs and uses.

13 275. Under the Drought Contingency Plan, during the period between 2020 and
14 2026 Pinal County farmers will experience a ramp down in terms of their CAP water
15 deliveries, but they will **ramp up** their groundwater pumping. The FEIS fails to analyze
16 this reasonably foreseeable scenario.

17 276. After 2026, the Pinal County farmers will continue to pump from their
18 groundwater wells and infrastructure – pumping that will continue as long as there is water
19 to pump. This will span well into the period of Resolution Copper’s pumping from the
20 Desert Wellfield.

21 277. The Forest Service is also incorrect in the FEIS when it concludes that
22 70,000 AF in significant new pumping in the region will not have long-term impacts even if
23 the wells are shut down prior to 2026 (which they will not be). It is well understood that
24 the effects of groundwater pumping and the drawdown associated with groundwater
25 pumping continue for many years after the pumping is completed, which the FEIS did not
26 analyze.

27 ¹¹ [https://kjzz.org/content/1541866/10-million-fund-pinal-county-water-
infrastructure#:~:text=Water%20conservation%20is%20getting%20new,Arizona%20Regional%20Irrigation%20Efficiency%20project.](https://kjzz.org/content/1541866/10-million-fund-pinal-county-water-
28 infrastructure#:~:text=Water%20conservation%20is%20getting%20new,Arizona%20Regional%20Irrigation%20Efficiency%20project.)

1 278. Thus, the impacts from new Pinal County farmers' pumping will continue
2 into the period of time that Resolution is extracting massive quantities of water from the
3 Desert Wellfield.

4 279. This reasonably foreseeable future activity was not analyzed in the FEIS as a
5 cumulative impact. This violates NEPA and the NDAA.

6 280. As with the other inadequacies noted herein, the FEIS does not meaningfully
7 address the direct, indirect, and cumulative impacts to Arizona's water supplies and to
8 Arizona's water users stemming from Resolution's water pumping in the context of the
9 past, present and reasonably foreseeable actions required for a cumulative impacts analysis.

10 281. In addition, the cumulative impacts from the nearby Florence Copper Project
11 were not analyzed in the FEIS. Located near the town of Florence, a demonstration project
12 has been in operation since 2019 and the Arizona Department of Environmental Quality is
13 in the process of amending the Aquifer Protection Permit for the project to allow a total of
14 1,765 injection and recovery wells, 90 perimeter wells and approximately 45 observation
15 wells. The project calls for additional drawdown of groundwater in the impact area of the
16 Desert Wellfield. In addition to adding to water quantity drawdown, the mine project could
17 potential render unusable a large quantity of groundwater surrounding the project.

18 **Additional Critical Issues Ignored by the FEIS**

19 282. Regarding the lands to be exchanged between Resolution and the United
20 States, the FEIS states that it does not know which lands will be exchanged, as that will
21 only be determined through the appraisal process:

22
23 With regard to the land exchange, Section 3003 of PL 113-291 directs the
24 Secretary of Agriculture to convey to Resolution Copper all right, title, and
25 interest of the United States in and to identified Federal land if Resolution
26 Copper offers to convey to the United States all right, title, and interest of
27 Resolution Copper in and to identified non-Federal lands. Note that the
28 acreages shown in this section are those offered by Resolution Copper to
the Federal Government, after completion of surveys. Ultimately, the
Federal Government may not accept all portions of these lands. **The exact
parcels and acreage would be assessed through the land appraisal
process.** With regard to the land exchange, Section 3003 of PL 113-291

1 directs the Secretary of Agriculture to convey to Resolution Copper all
2 right, title, and interest of the United States in and to identified Federal land
3 if Resolution Copper offers to convey to the United States all right, title,
4 and interest of Resolution Copper in and to identified non-Federal lands.
5 Note that the acreages shown in this section are those offered by Resolution
6 Copper to the Federal Government, after completion of surveys.
7 Ultimately, the Federal Government may not accept all portions of these
8 lands. **The exact parcels and acreage would be assessed through the
9 land appraisal process.**

10 FEIS at ES-9 (emphasis added).

11 283. However, as noted above, the Agency refused to include any detailed
12 information on the appraisals in the FEIS, and the public has been left in the dark as to the
13 actual lands, and values, to be exchanged. This violates the Agency's public review
14 requirements in NEPA and the NDAA.

15 284. Other critical direct, indirect or cumulative impacts completely ignored in
16 the FEIS are the impacts (and baseline conditions) associated with the smelting/processing
17 of the ore concentrate.

18 285. "Filtered copper concentrate would be loaded and shipped 7 miles along the
19 MARRCO corridor by rail car to Magma Junction where the rail line meets the Union
20 Pacific Railroad. **Final smelter destination is unknown at this time.**" FEIS at 77 (Table
21 2.2.2-6 "Existing and proposed mine access roads and traffic") (emphasis added).

22 286. The Agency refused to review these impacts, saying they are "speculative."

23 Post-sale delivery, smelting, and use of copper or molybdenum
24 concentrates similarly cannot be analyzed without knowing the transport
25 route or end location. The use of trucks to transport molybdenum
26 concentrate from the West Plant Site is incorporated into the EIS analysis
27 for those highways and routes in the immediate vicinity of the mine;
28 **movement beyond these routes is speculative at this time.** The delivery
of concentrate from the filter plant and loadout facility to the railhead near
Magma Junction is incorporated into the EIS analysis; **movement beyond
this point is speculative at this time.** Similar to power use, the exception
is estimation of greenhouse gas production. As a global issue, the specific
transport routes are not necessary to estimate greenhouse gas production.

1 FEIS at 12 (emphasis added). But the smelting/processing of mineral ores, necessary for
2 any mining operation, are not “speculative,” as they are a fundamental and necessary part
3 of any mining project.

4 287. The FEIS does not discuss or analyze where the smelting would then occur,
5 or the full and anticipated impacts (such as air pollution) from the smelting or rail/truck
6 transport, as required by NEPA and the NDAA.

7 288. Here, the Agency proposes approving an Exchange and mine Project when it
8 has no idea where the company will further process the minerals. In essence, it reviewed
9 only part of the mine Project, for without smelting, the entire mine Project could not occur.

10 289. But the Agency cannot meet its NEPA duties with such blinders on. An EIS
11 for a mining operation must fully review the impacts from off-site ore processing and
12 transportation. S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior,
13 588 F.3d 718, 725 (9th Cir. 2009). “[T]he air quality impacts associated with transport and
14 off-site processing of the five million tons of refractory ore are prime examples of indirect
15 effects that NEPA requires be considered.” Id. The Ninth Circuit has also rejected an
16 argument that the agency can avoid reviewing impacts simply because the mining company
17 did not provide the necessary information. “[I]nsofar as [the agency] has determined that it
18 lacks adequate information on *any* relevant aspect of a plan of operations, [the agency] not
19 only has the authority to require the filing of supplemental information, it has the obligation
20 to do so.” Ctr. for Biological Diversity v. U.S. Dep’t of Interior, 623 F.3d 633, 644 (9th
21 Cir. 2010)(emphasis in original).

22 290. “The Forest Service says that cumulative impacts from non-Federal actions
23 need not be analyzed because the Federal government cannot control them. That
24 interpretation is inconsistent with 40 C.F.R. §1508.7, which specifically requires such
25 analysis.” Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1217 (9th Cir. 2008).

26 291. Thus, the Agency’s failure to obtain this critical information, simply because
27 Resolution refused to provide it, is not an excuse to violate NEPA’s public information and
28 review mandates.

1 *The Failure to Consider the Avoidance, Minimization or Mitigation for Impacts from the*
2 *Desert Wellfield Pumping*

3 *Water Impacts – East Salt River Valley*

4 292. In addition to the Forest Service’s failure to comply with its NEPA and
5 NDAA mandates to review the baseline conditions and all direct, indirect, connected, and
6 cumulative impacts from the Project, the Agency failed to meet its NEPA and NDAA
7 requirements to fully analyze all potential mitigation measures, and the effectiveness of any
8 such mitigation measures, on water quantity, water quality, and other resources in the
9 region.

10 293. Even with the limitations identified above, pertaining to Resolution Copper’s
11 dewatering in the Desert Wellfield, which (among other things) grossly underestimates
12 declines in groundwater levels in the East Salt River Valley, and in the case of the Pinal
13 AMA, ignores groundwater declines completely, the Forest Service still predicts substantial
14 groundwater declines in the region stemming from the Desert Wellfield pumping.

15 294. The FEIS estimates that the “[p]rojected drawdown [in the East Salt River
16 Valley] would be greatest in the center of the Desert Wellfield, reaching a maximum
17 drawdown of 228 feet, as shown in figure 3.7.1-2. FEIS at 415. “At the north and south
18 ends of the wellfield, maximum drawdown ranges from 109 to 132 feet, and farther south,
19 within NMIDD [New Magma Irrigation and Drainage District], maximum drawdown is
20 roughly 49 feet (Bates et al. 2018; Garrett 2018a).” Id.

21 295. The significant decline in groundwater levels resulting from drawdowns
22 from the Desert Wellfield would adversely impact individual wells throughout the East Salt
23 River Valley, in both the Phoenix AMA and the Pinal AMA, as well as the associated
24 environmental values the agency cannot allow to be so damaged.

25 296. The Forest Service acknowledges that this drawdown could impact
26 individual wells, rendering shallow wells dry or requiring other well owners to deepen their
27 wells. FEIS at 393; *see also* FEIS at 973 (“[T]here likely would be certain areas that
28

1 experience lack of well capacity and groundwater shortages, particularly around the edges
2 of the basin.”).

3 297. The Forest Service also admits the “overall the cost of pumping would
4 increase as groundwater deepens, and infrastructure costs would increase as wells and
5 pumps need to be lowered or replaced.” Id. Yet the FEIS did not analyze these financial
6 and infrastructure impacts, nor analyze mitigation measures to compensate for the impacts.

7 298. NEPA was enacted to promote efforts that will prevent or eliminate damages
8 to the human environment. This can be accomplished by (1) avoiding an impact by not
9 taking certain actions or parts of actions; (2) minimizing an impact by limiting the degree
10 or magnitude of the action and its implementation; (3) rectifying an impact by repairing,
11 rehabilitating, or restoring the affected area; or (4) by replacing or providing substitute
12 resources or environments. 40 C.F.R. § 1508.20.

13 299. The selection of appropriate mitigation measures is one of the components of
14 the alternatives analysis required by the NEPA process. 40 C.F.R. § 1502.14. The agency
15 must state whether all practicable means to avoid or minimize harms from the alternative
16 selected have been adopted, and if not, why not. Id. at 1505.2(c).

17 300. In this case, the Forest Service readily acknowledges that (1) Resolution
18 Copper would consume from the Desert Wellfield at least “550,000 acre-feet over the life
19 of the mine” under the preferred alternative, FEIS at 418 (enough to meet the water demand
20 for 2.2 million households in Arizona for a year); (2) the Wellfield would reduce
21 groundwater levels by at least 228 feet; and (3) the pumping by Resolution Copper at the
22 Desert Wellfield would adversely impact individual groundwater wells and the needed
23 water supply for the region and the State of Arizona overall. Nevertheless, the Agency
24 failed to meaningfully consider or analyze any ways to avoid or minimize these substantial
25 and adverse water impacts.

26 301. The Forest Service also failed to analyze and require Resolution Copper to
27 mitigate for the substantial and adverse impacts to groundwater levels in the East Salt River
28 valley and, in particular, to offer any form of mitigation for those wells that would need to

1 be deepened or would go dry as a result of these declines, visiting substantial costs on
2 individuals, entities, and communities in the area.

3 302. The Forest Service instead defers this analysis to the Arizona Department of
4 Water Resources, concluding that Resolution Copper will be required to file for various
5 permits with that Department pertaining to the Desert Wellfield pumping.

6 303. The USFS concludes: “concerns have been raised regarding drawdown from
7 the Desert Wellfield, in the East Salt River valley. **The permitting process for the
8 wellfield will determine whether there are unavoidable impacts that may need
9 mitigation**, in which case Resolution Copper has indicated a willingness to consider
10 additional measures.” FEIS at 422 (emphasis added). *See also* FEIS, Appendix J at J-4
11 (“While ... mitigation is in place for water level declines caused by dewatering near the
12 mine site (see measure FS-WR-01), no such protections are in place for the area near the
13 Desert Wellfield in the East Salt River valley.”).

14 304. Yet, under NEPA (and the NDAA), the Forest Service cannot defer the
15 analysis of impacts, mitigation measures, and their effectiveness, to some future state
16 permitting process. Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1103-04 (9th Cir.
17 2016)(federal agency EIS could not rely on future state permitting as substitute for the
18 environmental review requirements under NEPA).

19 305. Further, the Forest Service notes that Resolution Copper has not “brought
20 forth voluntary mitigation for impacts to nearby well owners or property owners” in the
21 East Salt River Valley for pumping impacts caused by the Desert Wellfield. FEIS,
22 Appendix R at 354.

23 306. In the response to comments, the Forest Service ultimately admits that, “**no
24 specific monitoring or mitigation measures are included in the DEIS specific to the
25 Desert Wellfield in the East Salt River valley**. This groundwater pumping is subject to
26 permitting by the ADWR.” FEIS at R-235 (emphasis added). Relatedly, no specific
27 monitoring or mitigation measures are included by the Forest Service in the FEIS either.
28

1 307. NEPA regulations require that the agency’s environmental review: (1) “include
2 appropriate mitigation measures not already included in the proposed action or alternatives,”
3 40 C.F.R. § 1502.14(f); and (2) “include discussions of: . . . Means to mitigate adverse
4 environmental impacts (if not already covered under 1502.14(f)).” 40 C.F.R. § 1502.16(h).

5 308. “All relevant, reasonable mitigation measures that could improve the project
6 are to be identified, even if they are outside the jurisdiction of the lead agency or the
7 cooperating agencies” *Forty Most Asked Questions Concerning CEQ’s National*
8 *Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981).

9 309. NEPA further requires that the Forest Service review mitigation measures as
10 part of the NEPA process—not in some future decision shielded from public review. 40
11 C.F.R. § 1502.16(h).

12 310. Here, the Forest Service violated NEPA and the NDAA when it left it up to
13 Resolution Copper to decide whether or not it might voluntarily “mitigate” for the potentially
14 catastrophic impacts from the Desert Wellfield on local water supplies and wells, and where
15 the USFS determined in the FEIS to defer to a subsequent ADWR permitting process the
16 determination of (1) whether or not there will be “unavoidable impacts” from the Desert
17 Wellfield (a point that seems clear); and (2) whether or not, and how, these impacts should
18 be mitigated.

19 *Impacts to Apache Leap*

20 311. The NDAA established the Apache Leap Special Management Area “to
21 preserve the natural character of Apache Leap; to allow for traditional uses of the area by
22 Native American people; and to protect and conserve the cultural and archeological
23 resources of the area.” Section 3003(g)(2)(A)-(C); FEIS at 43. The potential for subsidence
24 from the crater to impact the Apache Leap Special Management Area mandates that the
25 Forest Service require mitigation measures to avoid, minimize, and otherwise mitigate
26 subsidence impacts, and NEPA requires that the Forest Service analyze the effectiveness of
27 such measures in the FEIS. FEIS at 24; Appendix J, J-10 (noting USFS authority under 36
28 C.F.R. § 251.56 and 36 C.F.R. § 228.8).

1 312. The block caving operation is anticipated to create a nearly a 2-mile diameter
2 crater estimated to be between 800 and 1,115 feet deep. FEIS at ES-3, 190. To accompany
3 proposed monitoring of subsidence, the FEIS unveiled a proposal to establish three tiers of
4 triggers to inform potential mitigation for subsidence, should it be greater than what the
5 modeling anticipated. These triggers, Level 1, Level 2, and Level 3, if met, may prompt
6 additional monitoring and review and potential responsive actions. FEIS at 188.

7 313. Level 1 is triggered if subsidence extends farther than the model results
8 anticipated by less than 30 percent and would prompt only “focus on data validation and
9 more intensive monitoring.” FEIS at 188.

10 314. Only Level 2 and Level 3 could provide any potential for substantive
11 mitigation in response to larger than intended subsidence, namely in the form of potentially
12 altering the mining operation. Level 2 is triggered if subsidence extends farther than the
13 model results by 30 to 60 percent and could prompt reduction or modification of the
14 amounts and locations of ore removal. FEIS at 188. Level 3 is triggered by subsidence that
15 extends farther than the model results by 60 percent, and could include the cessation of
16 mining. FEIS at 188.

17 315. Although NEPA requires the Forest Service to analyze the effectiveness of
18 mitigation measures for this anticipated subsidence, and thus the effectiveness of the
19 percentages for triggering mitigation actions, the FEIS is devoid of any such analysis.
20 Also, these proposed triggers are new since the DEIS and were never provided for public
21 review or comment.

22 316. The Forest Service’s decision to use a 30 percent increase as the threshold of
23 when substantive mitigation measures may be undertaken, renders the proposed mitigation
24 worthless for protecting Forest Service resources, particularly the Apache Leap Special
25 Management Area. Apache Leap is less than a quarter-mile away from the modeled upper-
26 end subsidence diameter (1.8 miles). Thus a 30 percent increase would result in a 2.34 mile
27 wide diameter, and would be the minimum required for Level 2 trigger and could
28 potentially lead to modifications of the mine plan. But this would be too little too late, as

1 Apache Leap would already be engulfed. The lack of analysis of the effectiveness of these
2 triggers for mitigation is a grave error in the Forest Service's NEPA analysis and also
3 violates the NDAA in failing to ensure the very purposes for which the Apache Leap
4 Special Management Area was established will be met and will be protected.

5 *Land Subsidence and Fissures in the East Salt River Valley*

6 317. An additional failure of FEIS involves the long-term extraction of
7 groundwater, which would cause land subsidence and fissures in the earth. "An important
8 aspect of subsidence is that it is irreversible; once sediment layers collapse when
9 dewatered, they remain collapsed even if water levels recover." FEIS at 412.

10 318. These occurrences would be particularly concentrated in the East Salt River
11 Valley subbasin, where at least 544,858 AF of water would be pumped for the Mine Project
12 under the preferred alternative as noted above.

13 319. ADWR's Water Planning Atlas states: "Earth fissuring and subsidence have
14 occurred in the ESRV [East Salt River Valley] sub-basin due to localized pumping. These
15 occurrences are found near Apache Junction and in the vicinities of Queen Creek, North
16 Scottsdale and Paradise Valley (Rascona, 2005)." Arizona Water Atlas Vol. 8, Active
17 Management Area Planning Area, p. 8 (2010).¹²

18 320. Based upon estimates of groundwater declines in the area of the Desert
19 Wellfield in a range of 228 feet, FEIS at 415 & Figure 3.7.1-2, the Forest Service
20 acknowledges the potential for significant subsidence, admitting "drawdowns associated
21 with the Desert Wellfield likely would result in subsidence of roughly 24-52 inches." FEIS,
22 V-2 at 412.

23 321. Subsidence can be costly to farmers, since it can crack and break irrigation
24 ditches and canals, disturb previously leveled farm fields, and disrupt the flow of irrigation
25 water, among other things.

26
27 _____
28 ¹² https://infoshare.azwater.gov/docushare/dsweb/Get/Document-10433/Volume_8_final.pdf

1 322. Subsidence can also harm groundwater wells and well-casings, result in
2 ruptured water and sewer lines, damage streets, highways and bridges, and damage the
3 foundations of houses and buildings, all requiring costly repairs.

4 323. The Forest Service fails to meaningful identify or consider the adverse
5 impacts to the types of infrastructure described above that would result from potentially 52
6 inches of land subsidence predicted in the FEIS for the East Salt River Valley caused by
7 Resolution’s groundwater depletions from the Desert Wellfield.

8 324. For example, the Central Arizona Project (“CAP”) canal that delivers critical
9 water supplies from the Colorado River all the way to Phoenix, and then down past Tucson,
10 is within approximately 3-miles of the Desert Wellfield, and it is well within the projected
11 subsidence impact area for the Desert Wellfield. Additionally, at least 20 miles of both the
12 Federal US-60 and another 20 miles of State Route SR-79 are also well within in the
13 projected subsidence impact area for the Desert Wellfield.

14 325. The USFS fails to examine or disclose the direct, indirect, and cumulative
15 pumping from the Desert Wellfield on water and other infrastructure in the region.

16 326. The FEIS also does not examine how these subsidence impacts could be
17 avoided, minimized, or mitigated under NEPA and the NDAA.

18 327. Similarly, the FEIS ignores the likelihood of earth fissuring and its related
19 impacts to these same structures and infrastructure in the area surrounding the Desert
20 Wellfield and within the East Salt River valley.

21 328. The failures of the Forest Service to identify and consider the baseline
22 conditions, and the direct, indirect and cumulative impacts from the significant subsidence
23 predicted in the FEIS resulting from the Desert Wellfield pumping, or to consider how
24 these impacts can be avoided, minimize or mitigated, violates NEPA and the NDAA.

25
26 **Water Impacts at the Mine Site Itself**

27 329. Over the life of the Mine, groundwater modeling relied on by the Forest
28 Service estimates that 87,000 AF of water will be dewatered (pumped) from the Mine and

1 from ancillary facilities associated with the Mine. FEIS at 405. This water will be
2 substantially consumed by mining processes. Id. This is in addition to all of the massive
3 Desert Wellfield pumping detailed above.

4 330. The FEIS acknowledges that Mine dewatering and subsidence will impact or
5 destroy 18 groundwater-dependent ecosystems, including springs and surface water
6 resources throughout the Oak Flat area. *See, e.g.*, FEIS at ES-25; FEIS at 396, Figure 3.7.1-
7 9.

8 331. The Forest Service acknowledges, “the fact that even relatively small
9 changes in water levels can have large effects on natural systems.” FEIS at 385.

10 332. The Forest Service substantially underestimates (and thus fails to
11 meaningfully analyze or consider under NEPA) the direct, indirect, and cumulative impacts
12 of removing (via dewatering) at least 87,000 AF of water on groundwater and surface water
13 quality and on the numerous groundwater-dependent ecosystems in this arid region,
14 including the vitally important springs, seeps, and surface resources of the region.

15 333. The work of hydrologist, Dr. Robert Prucha, whose report was attached to
16 Plaintiffs’ comments to the DEIS, illustrates the severe failures of the groundwater
17 modeling approach used by the Forest Service to evaluate the adverse impacts of the mine
18 Project, including the mine dewatering activities, predicted subsidence crater(s), and other
19 mine activities.

20 334. Dr. Prucha’s work proves, among other things: (1) formation of a pit lake or
21 lakes associated with the subsidence at the mine site and thus ongoing impacts to the
22 aquifer post mine-closure were not meaningfully evaluated by the Forest Service; (2) the
23 true range of impacted groundwater-dependent ecosystems was severally underestimated;
24 (3) the Forest Service examined surface water and groundwater in isolation, as if these two
25 water resources are not hydrologically connected in key groundwater-dependent ecosystem
26 locations when they are connected; and (4) the model’s evaluations of the relationship
27 between stream flows and aquifer conditions (stream-aquifer flows) was not assessed.
28

1 335. The modeling used by the Forest Service fails to comply with industry
2 standards in the larger modeling community—standards that consider many of the issues
3 and factors outlined in the Prucha report, including the importance of simulating the
4 dynamic interaction between surface and groundwater resources and the critical importance
5 of conducting a predictive uncertainty analysis that would have provided critical
6 information to the Forest Service regarding the range and possible extent of the drawdown
7 (including the worst-case drawdown) and the corresponding impacts to groundwater-
8 dependent ecosystems that would be caused by dewatering at least 87,000 AF of from the
9 Mine, among other impacts.

10 336. The failures of the Forest Service’s modeling efforts and corresponding
11 failure to take a hard look at the impacts (including a range of impacts) from the Mine
12 dewatering consistent with industry standards violated NEPA.

13 337. The Forest Service has also failed to fully analyze or disclose the impacts of
14 ten plus years of ongoing mine shaft dewatering (Shafts 9 and 10) or other mine activities
15 on the numerous springs, seeps in the Oak Flat area, including the many groundwater-
16 dependent ecosystems in the area, as well as surface flows in Queen Creek, Ga’an Canyon,
17 and elsewhere.

18 338. The Forest Service concludes in the FEIS that the, “dewatering of the deep
19 groundwater system has taken place since 2009 to allow construction and maintenance of
20 mine infrastructure” and, “[t]his dewatering pumping is legal and has been properly
21 permitted by ADWR” and it will be continued “throughout the mine life.” FEIS at 372.

22 339. Groundwater levels in the deep groundwater system below Oak Flat (close to
23 the pumping that has been dewatering Shafts 9 and 10) have dropped over 2,000 feet since
24 2009. FEIS at 387.

25 340. As noted above, the Forest Service wrongly includes in its baseline
26 conditions (via the No-Action Alternative) the serious effects of Resolution Copper’s
27 ongoing dewatering of the deep groundwater system at Oak Flat—a process it has actively
28 engaged in to support feasibility analysis activities for the Mine Project since at least 2009.

1 FEIS at 373 (“We confirmed our choice to use the current groundwater conditions at the
2 site as the baseline to which project-related impacts are compared (Garret 2018d)”); FEIS
3 at 396, Figure 3.7.1-9 (No Action to include continued dewatering from Resolution’s pre-
4 feasibility operations for Bitter Spring, Bored Spring, Hidden Spring, McGinnel Mine
5 Spring, McGinnel Spring, and Walker Spring); *see also* FEIS at 394.

6 341. Many of the springs and various other surface water featured were
7 subsequently surveyed by Plaintiffs (including GPS locations), yet this information was
8 also not considered in the USFS’ baseline analysis under NEPA.

9 342. As a result, the direct, indirect, and cumulative impacts to the affected
10 environment, including to numerous groundwater-dependent ecosystems, resulting from
11 Resolution Copper’s ongoing dewatering activities (particularly vis-à-vis Shafts 9 and 10)
12 have not been considered by the Forest Service in the FEIS, because numerous
13 groundwater-dependent ecosystems that existed prior to Resolution Copper’s dewatering
14 (post 2009) no longer exist today due to this dewatering.

15 343. In 2008, Resolution Copper applied for, and was granted, a Special Use
16 Permit for the construction and installation of the pipeline within the MARRCO corridor
17 that delivers mine water from Shafts 9 (and now 10) to the New Magma Irrigation District.

18 344. As part of this Special Use process, Resolution Copper was required by the
19 Forest Service to document the numerous surface water features (groundwater-dependent
20 ecosystems) within the Queen Creek Watersheds and the Ga’an Canyon Watershed,
21 including the estimated minimum observed discharges from various springs and surface
22 water features in the region.

23 345. In the FEIS, the Forest Service did not consider this information or make a
24 comparison between groundwater-dependent ecosystems that existed at the time of the
25 MARRCO special use permit—which was immediately prior to Resolution Copper’s
26 dewatering of Shafts 9 and 10 (2008/09)—and those that exist today when it established the
27 environmental baseline for the FEIS, because the Forest Service concluded, without
28 explanation or support, that, “this was the appropriate approach under NEPA,” FEIS at 373,

1 and because, “selecting past point in time as a baseline does not reflect the environment as
2 it exists today.” Id.

3 346. Resolution Copper’s ongoing pumping, which has been conducted to
4 facilitate the Mine Project currently before the Forest Service in the FEIS, cannot be baked
5 into the environmental baseline without violating NEPA. The Forest Service must consider
6 the full range of impacts from the entire scope of this Mine Project (including Resolution’s
7 ongoing dewatering of Shafts 9/10 since 2009) under NEPA and the NDAA.

8 347. The Forest Service’s decision to include ongoing dewatering from Shafts
9 9/10 in the baseline does not represent true baseline environmental conditions as it grossly
10 underestimates the magnitude and extent of mine impacts on the affected environment on
11 the low side, including but not limited to, on groundwater-dependent ecosystems.

12 348. At minimum, predicted drawdowns should have been calculated from actual
13 groundwater conditions that existed prior to the dewatering of Shafts 9 and 10 to avoid
14 improper segmentation of Project impacts under NEPA.

15 349. The Forest Service also acknowledges that a pit lake could form from the
16 subsidence crater(s) at the Mine site: “We acknowledged in the DEIS that several
17 conditions exist that suggest a lake could form, including the presence of a subsidence
18 crater estimated to be 800 to 1,100 feet deep, recovering groundwater levels in the deep
19 groundwater system after dewatering ends, and a block-cave zone that would hydraulically
20 connect the deep groundwater system to the surface.” FEIS, Appendix R at 380.

21 350. Yet, the potential for a pit lake to form in the subsidence crater(s) is later
22 dismissed by the Forest Service without basis as speculative. FEIS at 461.

23 351. However, Dr. Prucha’s work demonstrates that it is reasonably foreseeable
24 that a pit lake would form within the subsidence crater with water from the shallow alluvial
25 aquifer and other sources that would continue to deplete to the local and regional aquifer
26 due to ongoing evaporation and other losses.

27 352. The direct, indirect, and cumulative impacts from the pit lake should have
28 been considered by the Forest Service under NEPA.

1 **Water Quality Impacts**

2 353. The Project would impact groundwater and surface water quality throughout
3 the region. For example, the exposure of the mined rock to water and oxygen, inside the
4 mine as well as in stockpiles prior to processing, could create depressed pH levels and high
5 concentrations of dissolved metals, sulfate, and dissolved solids. FEIS at 423. After
6 processing, the tailings would be transported for disposal into the tailings storage facility.
7 Id. Seepage from the tailings has the potential to enter underlying aquifers and impact
8 groundwater quality. Id. In addition, contact of surface runoff with mined ore, tailings, or
9 processing areas has the potential to impact surface water quality. Id.

10 354. Yet, the FEIS contains virtually no information pertaining to the level of
11 contaminants that would be likely to occur from the mine discharges, runoffs, seepage, or
12 other aspects of the Project. Similarly, the FEIS also does not disclose or consider if or
13 where these contaminants might result in water quality impacts to surface waters and to
14 what levels.

15 355. The FEIS at ES-25 acknowledges: “[a]ll of the tailings facilities would lose
16 seepage with poor water quality to the environment,” but then asserts that seepage from
17 Alternative 6, “does not result in any anticipated water quality problems.”

18 356. The Skunk Camp TSF [Tailings Storage Facility] Seepage Assessment
19 Report¹³ contains no information about the possible contaminants in tailings seepage water,
20 and no information on background ground and surface water quality or potential impacts
21 thereto from seepage water contamination, nearby impaired waterways, etc.

22 357. Rather, the report just vaguely acknowledges that a seepage management
23 plan, “has not been optimized, rather, it is intended to demonstrate that compliance is
24 expected to be achievable for the Skunk Camp TSF. Future designs and studies will
25 optimize the plan to reduce impacts to groundwater and uncertainties” (p.15).

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¹³ <https://www.resolutionmineeis.us/documents/kcb-skunk-camp-seepage-assessment-2020>

1 358. Yet “future studies” are not permitted under NEPA and the single-EIS
2 requirement of NDAA §3003(c)(9)(B) and therefore were required to have been done
3 already.

4 359. The FEIS, at 85, notes that a final post-closure management plan for the
5 tailings storage facility is not completed but rather, “would be determined as the project
6 progresses through NEPA process” at some vague future point in time. Many sections of
7 the posted Skunk Camp TSF Reclamation Plan document¹⁴ are marked as “preliminary,”
8 and references abound throughout to “preliminary estimates” and matters that “will be
9 reviewed in future design stages,” all confirming that this is not in final form based on the
10 aforementioned language in the FEIS.

11 360. This is a violation of the NEPA and the single-EIS requirement of the 2015
12 NDAA and is not permissible.

13 361. Regarding the extremely high temperature of the groundwater encountered at
14 the site, the FEIS does not contain any discussion regarding how the groundwater model
15 was adjusted or corrected in any way when, in 2014, it failed to predict the hot (180-degree
16 F) water encountered while drilling Shaft No. 10. The Forest Service also failed to include
17 or meaningfully analyze any similar issues of geothermally influenced water circulation or
18 the direct, indirect, or cumulative impacts thereof, including on groundwater dependent
19 ecosystems and water quality, and including within the post-closure subsidence fracture
20 zone/pit lake.

21 362. Regarding baseline conditions and impacts closer to the town of Superior,
22 the FEIS states, “groundwater drawdown caused by the mine could affect groundwater
23 supplies for wells that may draw from either the regional Apache Leap Tuff aquifer or the
24 deep groundwater system. Drawdown from 10 to 30 feet is anticipated in wells in the
25 Superior area and ... impacts from 10 to 30 feet could also occur in wells near Top-of-the-
26 World.” FEIS at 410-11.

27
28 ¹⁴ (<https://www.resolutionmineeis.us/sites/default/files/references/kcb-skunk-camp-tsf-reclamation-plan-2020.pdf>)

1 363. Yet the Agency fails to include a detailed analysis of these impacts and
2 purported mitigation for public review as required by NEPA and the NDAA.

3 364. Regarding the water resources at the Skunk Camp tailings waste facility, the
4 FEIS states that: “A single downvalley seepage collection pond would be the primary
5 means for seepage and embankment construction and surface water collection during
6 operations, with the collected water then pumped to a recycled water pond located within
7 the operating PAG [Potentially Acid Generating] cell for use as process water at the
8 cyclone house **and/or at the West Plant Site**, or for dust management at the tailings
9 storage facility.” FEIS at 126 (emphasis added).

10 365. But there is no meaningful analysis of how the tailings seepage water would
11 be transported to the West Plant Site, or consideration of that water use at the West Plant.
12 Further, if the seepage is collected below the tailings facility, the FEIS is devoid of the
13 required analysis of the infrastructure needed for a return pipeline/pump system at the
14 bottom of the facility. *See* FEIS at 121, Figure 2.2.8-2.

15 366. Additionally, there is no detailed analysis of the quality of the seepage from
16 the tailings that may be spread on the ground for dust suppression, allowed to reach
17 groundwater at the site, or be transported back to the West Plant site and then discharged as
18 noted above.

19 367. Indeed, the Forest Service recently admitted that seepage from the tailings
20 will only meet the applicable, “Arizona numeric aquifer water quality standards in the
21 downgradient aquifer beyond the immediate vicinity of the tailings storage facility.”
22 January 10, 2021 letter from Defendant Thomas Torres the Terry Rambler, Chairman of the
23 San Carlos Apache Tribe, at 5.

24 368. In other words, because the seepage water quality would exceed the
25 applicable standards at the site, the Agency cannot allow this contaminated water to be used
26 for dust suppression, or transported via the pipeline back for discharge at the West Plant
27 site or beyond. At a minimum, the FEIS’s failure to fully analyze the quality and uses of
28 this contaminated water violates NEPA and the NDAA.

1 **Failure to Adequately Analyze the Transmission and Power Infrastructure**

2 369. Another example of the failure to fully review and analyze (or even fully
3 describe) the impacts from Project facilities, the Draft ROD (p.5) proposes to approve
4 Special Use Authorizations for only two transmission lines: 1) One new 3.6-mile, 230kV
5 power line from the Silver King substation to Oak Flat, and 2) a 16.9-mile, either 69kV or
6 115kV power line from the Silver King substation to the Skunk Camp tailings storage
7 facility.

8 370. However, the USFS failed to conduct a meaningful review and analysis,
9 required by NEPA and the NDAA, of the many direct, indirect, and cumulative impacts
10 from these two transmission line corridors on the human environment.

11 371. The FEIS' discussions on Project impacts are highly vague and largely
12 unchanged from the DEIS, despite the recent and "substantial" redesign of the Skunk Camp
13 transmission line corridor (USFS Briefing Paper, 8/20/2020). Additionally, the new 3.6-
14 mile 230kV transmission line was misleadingly described as merely an "upgrade" of an
15 existing line and as such, no new corridor footprint for this line was ever fully analyzed or
16 provided for public comment as required under NEPA.

17 372. Review of the Project record indicates that only a cultural resources report
18 for the 230kV and 115kV lines (Charest 2020) may have been conducted. And still, only
19 the title page is provided and it is impossible to determine the scope of what this document
20 includes or does not include, or even which exact transmission lines (or design iterations
21 thereof) it purports to address.

22 373. In addition, the FEIS contains no other similar report for any of the other
23 myriad environmental impacts of the transmission lines including but not limited to water
24 impacts, impacts to wildlife species, vegetation, visual resources, recreation, air, access, or
25 otherwise. Any older reviews predating the substantial redesign of Skunk Camp tailings
26 corridor are now outdated and cannot be reasonably relied upon to fulfill the requirements
27 of a full NEPA review.

28

1 374. Separate from these two transmission lines, the FEIS also indicates that there
2 are several more new proposed transmission lines or substations related to this Project and
3 yet, no discussion appears in the FEIS looking at the impacts, baseline conditions,
4 footprints, or otherwise for these new and/or expanded transmission line corridor areas on
5 values such as wildlife and vegetation, visual impacts, cultural resource, air quality, water,
6 or other resources found within these rights-of-way. This failure to take a hard look at
7 these impacts violates NEPA and the NDAA.

8 375. The analysis needed to look at these impacts cannot be done later in time,
9 but rather, must be done now under the single EIS requirement of the NDAA.

10 376. For example, the FEIS indicates two new 230kV proposed new transmission
11 lines that appear to cross a portion of Forest Service lands and tie into an existing
12 transmission line (see callout box, Figure 2.2.2-15, FEIS p. 78), but that are never
13 analyzed.¹⁵

14 377. The FEIS indicates two new 69/34.5kV proposed new transmission lines
15 (Figure 2.2.2-15, FEIS p. 78), which also are never analyzed.

16 378. The FEIS (p.77) notes that, “[s]ubstations also would need to be upgraded
17 and/or new 230-kV substations would need to be constructed” but fails to ever give any
18 specifics about where a new 230kV new substation (or substations) would be located.

19 379. The FEIS indicates two new proposed 69kV power lines, and one new
20 proposed 12kV power line to run from the Abel substation “adjacent to the MARRCO
21 corridor” (not within) (Table 2.2.2-7, FEIS p.79-80). Yet Figures 2.2.2-12 and 2.2.2-13
22 (FEIS at 73-74) show only one “Proposed Transmission Line,” not the three lines indicated
23 just pages later.

24 380. The FEIS admits that “a portion of the MARRCO corridor is located on
25 [National Forest Service] lands and would be subject to Forest Service regulatory
26
27

28 ¹⁵ This contradicts Figure 2.2.2-9 (West Plant Site facilities overview), which shows these
two transmission lines as being on Resolution-owned land).

1 jurisdiction.” FEIS at ES-7. Yet as noted above, the Forest Service did not consider or
2 analyze the need for a Special Use Permit for these new uses of federal public lands.

3 381. The FEIS fails to analyze the obvious, basic requirement that a new
4 substation would also be required at the Skunk Camp tailings site to convert the high-
5 voltage power being transmitted through the new transmission line(s) into distribution
6 voltages for use, as well as the “access roads to service Skunk Camp.” No details or any
7 mention of this necessary facility appear anywhere in the FEIS.

8 382. In its November 18, 2020 letter responding to Salt River Project on its
9 Special Use Permit application for the transmission line(s), the Forest Service says that “it
10 is assumed” that the 500-foot corridor would be used. The agency admits that: “It is
11 understood that this proposal is preliminary and additional design, review, and other
12 regulatory process are required before an authorization will be issued.” The agency then
13 says, “[i]f the design and other regulatory processes have been completed and it is
14 determined that the proposed high voltage transmission line cannot be located within the
15 analyzed corridor, SRP shall submit a revised proposal and a complete review will be
16 required.” FEIS, Appendix Q.

17 383. Yet under NEPA and the NDAA, such “additional review” is not allowed,
18 as all aspects of this proposal were required to be contained the FEIS.

19 384. The Forest Service’s letter further refers to “lines” (plural) in the 500-foot
20 corridor, rather than the single transmission line for Skunk Camp mentioned in the FEIS.
21 To the extent that the application purports to request authorization for multiple transmission
22 lines, this has not been analyzed under NEPA, has not been included in the FEIS, and as
23 such, approval of this application would be contrary to law.

24
25 *Failure to Analyze the Baseline Conditions of All Potentially Affected Resources*

26 385. The FEIS fails to adequately analyze the affected environment, and baseline
27 conditions, of all potentially affected resources. As detailed above, this is especially true
28

1 regarding the baseline water conditions on and around the lands affected by Project
2 facilities as detailed above.

3 386. The late addition of the Skunk Camp site for the tailings waste facility
4 highlights the failure to review the water, wildlife, cultural, and other baseline conditions of
5 areas that may be affected by the Project. For example, for the Skunk Camp tailings site,
6 the Agency admits that: “Background groundwater quality is derived from a single sample in
7 November 2018 from a well located adjacent to Dripping Spring Wash. Background
8 surface water quality is derived from a single sample in November 2018 from the Gila
9 River at the confluence with Dripping Spring Wash.” FEIS at 437. The Forest Service has
10 apparently performed some additional water quality modeling (FEIS at 437), but it
11 continues to note this single-sample background data in the FEIS.

12 387. The Forest Service also notes elsewhere that 42 groundwater samples and 29
13 surface water samples were collected (FEIS at 178), but never describes or explains how
14 these additional samples were used or how this changed any analysis or conclusions
15 between the DEIS and FEIS.

16 388. The FEIS also fails to adequately analyze the baseline conditions and
17 impacts to wildlife. For example, the FEIS (Table 3.8.4-2, pp. 585-89) notes that thousands
18 of acres of bird and other species’ habitat, “potentially would be impacted under each action
19 alternative,” but no analysis is included as to how the Project activities—including but not
20 limited to dewatering and water use and transmission lines—would directly, indirectly, and
21 cumulatively impact wildlife, birds and habitat or the traditional, cultural or religious
22 practices of the Tribes.

23 389. Under the Land Exchange, the Oak Flat federal lands would leave Forest
24 Service jurisdiction, which would reduce wildlife protections on these lands as the National
25 Forest Management Act, Tonto National Forest Land and Resource Management Plan, the
26 Organic Act, and provisions of the Endangered Species Act would no longer apply. *See*
27 FEIS at 570.

28

1 **The Agency Failed to Correctly Apply Federal Public Land Law, In Violation of**
2 **FLPMA, the Organic Act, and the APA**

3 390. The Forest Service’s authority to regulate activities on national forest lands
4 is governed in part by the Organic Administration Act of 1897 (“Organic Act”), 16 U.S.C.
5 §§ 475, 551, which authorizes the agency to promulgate rules for the national forests, “to
6 regulate their occupancy and use and to preserve the forests thereon from destruction.” 16
7 U.S.C. § 551. One of the Act’s guiding principles is for the agency to “improve and
8 protect” the national forests. 16 U.S.C. §475. It further requires the Secretary of
9 Agriculture (through the Forest Service) to, “make provisions for the protection [of the
10 lands] against destruction by fire and depredations.” 16 U.S.C. § 551. The Service, “will
11 insure the objects of such [forest] reservations, namely, to regulate their occupancy and use
12 and to preserve the forests thereon from destruction.” Id.

13 391. The Forest Service regulations implementing these Organic Act mandates
14 are found, in relevant part, at 36 C.F.R. Parts 251 and 261, which govern uses on the
15 national forests.

16 392. Here, the Forest Service must regulate the Project under its Part 251/261
17 special use regulations, as well as FLPMA’s Title V Right of Way provisions, and not
18 under the Part 228A regulations under which the agency reviewed the Project under the
19 GPO.

20 393. The Agency’s authority under the Part 251/261 regulations are very different
21 from, and much more environmentally protective, than the Part 228A regulations that the
22 agency initially used to review the Project. For example, the Agency must deny the Project
23 if, “[t]he proposed use would not be in the public interest.” 36 C.F.R. §251.54(e)(5)(ii). In
24 violation of these requirements, the USFS did not review the Project under this “public
25 interest” standard.

26 394. The Part 251 regulations provide significant authority and discretion to
27 prohibit activity on Forest Service lands. In addition, under the related Part 261
28 regulations, the Forest Service is required to prohibit the destruction of cultural resources
and other resources on public lands, *see* 36 C.F.R. §§ 261.9(g)-(h), 261.10(a), (b).

1 395. The Forest Service failed to properly apply these requirements to the
2 Resolution Project, in violation of NEPA, the NDAA, FLPMA, the Organic Act, and their
3 implementing regulations.

4 396. Under FLPMA Title V, the Forest Service may only grant a right-of-way
5 special use permit if it, “(4) will do no unnecessary damage to the environment.” 43
6 U.S.C. § 1764(a). Rights-of-way “shall be granted, issued or renewed ... consistent with
7 ... any other applicable laws.” Id. § 1764(c). A Title V right-of-way special use permit
8 “shall contain terms and conditions which will ... (ii) minimize damage to scenic and
9 esthetic values and fish and wildlife habitat and otherwise protect the environment.” Id. §
10 1765(a). In addition, the right-of-way special use permit can only be issued if activities
11 resulting from the right-of-way special use permit:

12 (i) protect Federal property and economic interests; (ii) manage efficiently the
13 lands which are subject to the right-of-way or adjacent thereto and protect the
14 other lawful users of the lands adjacent to or traversed by such right-of-way;
15 (iii) protect lives and property; (iv) protect the interests of individuals living in
16 the general area traversed by the right-of-way who rely on the fish, wildlife, and
17 other biotic resources of the area for subsistence purposes; (v) require location
18 of the right-of-way along a route that will cause least damage to the
environment, taking into consideration feasibility and other relevant factors;
and (vi) otherwise protect the public interest in the lands traversed by the right-
of-way or adjacent thereto.

19 43 U.S.C. § 1765(b).

20 397. At least three important substantive requirements flow from the FLPMA’s
21 right-of-way special use permit provisions. First, the Forest Service has a mandatory duty
22 under Section 505(a) to impose conditions that, “will minimize damage to scenic and
23 esthetic values and fish and wildlife habitat and otherwise protect the environment.” Id.
24 §1765(a). The terms of this section do not limit “damage” specifically to the land within
25 the right-of-way corridor. Rather, the repeated use of the expansive term “the
26 environment” indicates that the overall effects of granting the right-of-way special use
27 permit on cultural, environmental, scenic and aesthetic values must be evaluated and these
28 resources protected. In addition, the obligation to impose terms and conditions that

1 “protect Federal property and economic interests” in Section 505(b) shows that the Forest
2 Service must impose conditions that protect not only the land crossed by the right-of-way,
3 but **all** federal lands and waters affected by the approval of the right-of-way special use
4 permit .

5 398. The Resolution Project could not operate as approved without the use of the
6 tailings and ore concentrate pipelines, electrical transmission lines, roads, and other
7 infrastructure reviewed in the FEIS and proposed to be approved by the upcoming Record
8 of Decision.

9 399. Second, the discretionary requirements in Section 505(b) require a Forest
10 Service determination as to what conditions are “necessary” to protect federal property and
11 economic interests, as well as “otherwise protect[ing] the public interest in the lands
12 traversed by the right-of-way or adjacent thereto.” This means that the Agency can only
13 approve the right-of-way special use permit if it “protects the public interest in lands” not
14 only upon which the pipeline/roads/transmission lines would traverse, but also lands and
15 resources adjacent to and associated with the right-of-way special use permit. Thus, in this
16 case, the Forest Service can only approve the right-of-way special use permits if the
17 operation of the mine itself “protects the public interest.” As shown herein, that clearly is
18 not the case.

19 400. Third, the requirement that the right-of-way grant “do no unnecessary
20 damage to the environment” and be “consistent with ... any other applicable laws,” *id.* §§
21 1764(a)-(c), means that a grant of a right-of-way special use permit leading to the Mine
22 must satisfy all applicable laws, regulations and policies. Here, because the Project would
23 violate many of these requirements, the agency cannot issue the right-of-way special use
24 permits.

25 401. The FEIS never discusses these statutory and regulatory requirements and
26 did not review the Project under these constraints as it was required to do.

27
28

1 402. Accordingly, the Agency’s failure to properly apply FLPMA and the
2 Agency’s right-of-way Special Use Permit regulations violates federal law and is arbitrary
3 and capricious.

4 **CLAIMS FOR RELIEF**

5 **Claim 1: Violation of the National Environmental Policy Act**

6
7 403. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this
8 Complaint herein by reference.

9 404. The Forest Service’s actions and decisions in the preparation, issuance, and
10 reliance upon the inadequate FEIS as part of its review and approval of the Exchange and
11 the Resolution Project, including: (1) the failure to take the required “hard look” at the
12 Exchange and the Resolution Project; (2) failure to review the Project under the correct
13 legal regime, including the failure to have a proper “purpose and need” for its review of the
14 Project; (3) failure to include any information or opportunity to comment upon the
15 appraisals (including the additional Non-Federal lands that may be conveyed to the United
16 States based on the appraisals); (4) failure to fully review and properly analyze all
17 reasonable alternatives; (5) failure to properly analyze the affected environment and
18 baseline conditions of all potentially affected resources; (6) failure to properly analyze all
19 connected and cumulative actions, and all direct, indirect, and cumulative impacts; (7)
20 failure to properly analyze mitigation measures and their effectiveness; and (8) failure to
21 comply with the public and agency review requirements under NEPA, are arbitrary,
22 capricious, an abuse of discretion, contrary to NEPA, and its implementing regulations, not
23 in accordance with the law, and without observance of procedures required by law, and in
24 excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5
25 U.S.C. §§ 701-706.
26
27
28

1 **Claim 2: Violation of Section 3003 of the NDAA**

2 405. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this
3 Complaint herein by reference.

4 406. The Forest Service’s actions and decisions in the preparation, issuance, and
5 reliance upon the inadequate FEIS as part of its review and approval of the Exchange and
6 the Resolution Project, including the failure to fully protect all cultural and Native
7 American resources from the Exchange and the Project and take the required “hard look” at
8 the Exchange and the Resolution Project and comply with the public and agency review
9 requirements under NEPA and Section 3003 of the NDAA, are arbitrary, capricious, an
10 abuse of discretion, contrary to the NDAA and NEPA, not in accordance with the law, and
11 without observance of procedures required by law, and in excess of statutory jurisdiction,
12 authority, or limitations, within the meaning of the APA. 5 U.S.C. §§ 701-706.

13
14 **Claim 3 Violation of the Forest Service Organic Act.**

15 407. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this
16 Complaint herein by reference.

17 408. The Forest Service’s actions and decisions issuing the inadequate FEIS as
18 part of its review and approval of the Exchange and the Resolution Project, are arbitrary,
19 capricious, an abuse of discretion, contrary to the Organic Act and its implementing
20 regulations (including Forest Service Regulations at 36 C.F.R. Parts 251, 261), not in
21 accordance with the law, and without observance of procedures required by law, and in
22 excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5
23 U.S.C. §§ 701-706.

24 **Claim 4: Failure to Properly Review and Regulate the Resolution Project in Violation**
25 **of the FLPMA, the Organic Act, and Public Land Laws.**

26 409. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this
27 Complaint herein by reference.
28

1 410. The Forest Service’s actions and decisions issuing the inadequate FEIS as
2 part of its review and approval of the Exchange and the Resolution Project, including its
3 failure to properly review and regulate all proposed activities on federal land, are arbitrary,
4 capricious, an abuse of discretion, contrary to the FLPMA, the Organic Act, NEPA, and
5 NDAA, and their implementing regulations (including Forest Service Regulations at 36
6 C.F.R. Parts 251, 261), not in accordance with the law, and without observance of
7 procedures required by law, and in excess of statutory jurisdiction, authority, or limitations,
8 within the meaning of the APA. 5 U.S.C. §§ 701-706.

9
10 **REQUEST FOR RELIEF**

11 For the foregoing reasons, Plaintiffs respectfully request that this court:

- 12 A. Declare that the Forest Service has violated NEPA, Section 3003 of the
13 NDAA, the Organic Act, FLPMA, the other laws noted herein, the APA, and the
14 implementing regulations and policies of these laws;
- 15 B. Set aside and vacate the FEIS and any actions or decisions based on the FEIS;
- 16 C. Enjoin the Forest Service from allowing, authorizing, or approving the
17 Exchange or any aspect of the Exchange or Resolution Project in reliance on the
18 FEIS until the Forest Service has complied with NEPA, Section 3003 of the NDAA,
19 the Organic Act, FLPMA, the other laws noted herein, the APA, and the
20 implementing regulations and policies of these laws;
- 21 D. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements,
22 including attorneys’ fees under the Equal Access to Justice Act, 28 U.S.C. § 2412,
23 and any other applicable federal law; and
- 24 E. Grant such additional relief as this court deems equitable, just, and proper.

25
26 Respectfully submitted this 22nd day of January, 2021,

27 */s/ Roger Flynn*

28 _____
Roger Flynn (pro hac vice application pending)

1 Jeffrey C. Parsons (pro hac vice application pending)
WESTERN MINING ACTION PROJECT
2 P.O. Box 349
440 Main St., #2
3 Lyons, Colorado 80540
4 303-823-5738
wmap@igc.org

5
6 Marc D. Fink (pro hac vice application pending)
CENTER FOR BIOLOGICAL DIVERSITY
7 209 East 7th Street
Duluth, Minnesota 55805
8 218-464-0539
9 Email: mfink@biologicaldiversity.org

10 Allison N. Melton (pro hac vice application pending)
CENTER FOR BIOLOGICAL DIVERSITY
11 P.O. Box 3024
12 Crested Butte, CO 81224
970-309-2008
13 Email: amelton@biologicaldiversity.org

14 Attorneys for All Plaintiffs

15
16 */s/ Susan Montgomery*

17 _____
Susan B. Montgomery (AZ Bar # 020595)
18 Robyn L. Interpreter (AZ Bar # 020864)
MONTGOMERY & INTERPRETER, PLC
19 3301 E. Thunderbird Rd.
Phoenix, AZ 85032
20 (480) 513-6825
smontgomery@milawaz.com
21 rinterpreter@milaz.com

22
23 Attorneys for the ITAA
24
25
26
27
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